

THE
CONSTITUTIONAL LAW
OF
INDIA & ENGLAND

TOGETHER WITH
THE GOVERNMENT OF INDIA ACT

BY

J. N. VARMA, B.A., LL. B. (BOM.); M. SC., ECON. (LOND.),
OF THE MIDDLE TEMPLE, BARRISTER AT-LAW, FELLOW OF THE ROYAL STATISTICAL
SOCIETY, SOMETIME ACTING PROFESSOR OF MERCANTILE LAW, SYDENHAM
COLLEGE OF COMMERCE AND ECONOMICS, BOMBAY.

AND

M. M. GHAREKHAN, B.A., LL. B., ADVOCATE
OF THE ORIGINAL SIDE, HIGH COURT; SOMETIME PROFESSOR OF LAW, SIR LALLUBHAI
SHAH LAW COLLEGE; SOMETIME PART-TIME PROFESSOR OF MERCANTILE LAW,
SYDENHAM COLLEGE OF COMMERCE & ECONOMICS; AUTHOR OF "PRINCIPLES
OF MERCANTILE LAW", "PRINCIPLES OF THE LAW OF NEGOTIABLE
INSTRUMENTS", "HINDU LAW", ETC., ETC.,

WITH A FOREWORD BY

THE RIGHT HON'BLE THE
VISCOUNT HAILSHAM,

P.C., K.C., D.C.L., LL.D.,
LORD HIGH CHANCELLOR OF GREAT BRITAIN (1928-29); SECRETARY OF
STATE FOR WAR (SINCE 1931); EDITOR IN CHIEF,
SECOND EDITION OF HALSBURY'S LAWS OF ENGLAND.

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FOREWORD

(FIRST EDITION)

A study of the Constitutional Law of India and England is of paramount importance to every Indian Lawyer and Statesman. The subject has hitherto received very little attention and has failed to arouse the interest which it deserves. It is a matter of satisfaction to find that the usefulness of the study of this subject is recognised by the University by its incorporation in the courses of study for certain Examinations in Arts and in Law.

To a Constitutional Lawyer and to a practical Statesman the constitution of India with the impending changes has come to occupy a very prominent place in study and application. The present work, whose authors have done me the honour of asking me to write a foreword, supplies a real want for the study of the essential principles underlying the constitutions of India and England and the outlines of their statutory and other provisions.

The recent lectures which are being delivered by Sir P. S. Sivaswamy Ayyar under the Kamala Lecture Series in Madras, the efforts which are being made in re-settling the constitution of India, the Bill introduced in Parliament on account of the efforts of Dr. Besant and the undertaking of the drafting of a new constitution for India to be presented for discussion when the Reforms Commission is constituted and begins its work are only some of the indications of the necessity of understanding the constitution of India as it exists.

I have great pleasure in finding that although this work is modestly conceived, it is well executed in its own proper proportion. I would like to call particular attention to its grouping and accuracy and to the useful comments on some of the detailed aspects of the constitution, particularly as regards the share and responsibility of Ministers in Provincial Governments. I hope the authors of this book will undertake to write a fuller and more comprehensive work as soon as the Report of the next Royal Commission is embodied either in a consolidated or an amending Statute.

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6TH SEPTEMBER 1927

BHULABHAI J. DESAI

To
THE RIGHT HONOURABLE THE
Viscount Hailsham

P. C., K. C., D. C. L., LL. D.,
LORD HIGH CHANCELLOR OF
GREAT BRITAIN (1928-29)

THIS WORK

IS

BY HIS GRACIOUS PERMISSION
DEDICATED BY
THE AUTHORS.

THE RIGHT HONORABLE THE

Baroness de Grey

FOREWORD.

I have had much pleasure in accepting the invitation tendered to me by the Authors to write a Foreword to this work on the Constitutional Law of India and England. The fact that the work has already passed through three Editions shows that there is a keen demand for such a book; and it is of particular value at the present juncture when the constitutional position of India is engaging the attention of the British Parliament. It is most important that those who attempt to take any part in framing the new constitution, or who wish to understand problems to which its framing must give rise, should have a clear idea of the existing Constitution of both countries. The present work appears to present a lucid and impartial account of the existing position, free from political bias or prejudice, and on that account, it seems to me to deserve every success

HAILSHAM

JULY 31ST, 1904.

PREFACE

(FOURTH EDITION)

The unexpectedly rapid sale of the third edition of this work has encouraged us to issue this fourth edition though at this moment the new "Constitution Act" is on the anvil of Parliament. We do not hesitate to express our feelings of gratefulness for the very warm reception the third edition has had. Responsible authorities inform us that students reading for the I. C. S., Provincial Service and M.A. Examinations also use this book.

As usual, we have made every attempt to bring the book upto date.

On the advice of our friend Mr. K. M. Munshi, to whom we are obliged we have numbered each para in this edition in order to facilitate reference.

The Part dealing with the English Constitutional law is placed at the end in this edition. As it is found necessary we wish to make it clear that this part, in no way, attempts to take the place of Prof. Dicey's standard and classical work "Law of the Constitution," Prof. Dicey's book presupposes knowledge of certain subjects on the part of its readers, and it is with these subjects mainly that this Part of our book deals. We have thus attempted to make this Part Supplementary to Prof. Dicey's work. Experience shows that such a book is greatly needed, particularly by the students.

We hasten to express our deep feeling of gratitude to THE RIGHT HON'BLE THE VISCOUNT HAILSHAM, who at the cost of his valuable time and inspite of his multifarious engagements, has honoured us by writing the FOREWORD. It is needless to add that we have been thereby much encouraged.

We express our thanks to our friends for making various suggestions for the preparation of this edition.

80, Esplanade Road, Fort, }
Bombay; June 26th, 1934. }

J. N. V.
M. M. G.

PREFACE

(THIRD EDITION)

We view with feelings of gratefulness the inclusion of our book by the University of Bombay in their list of books recommended for the study of Constitutional Law at the 1st LL. B. Examination. It is also gratifying to note the warm reception this Work has had from the public and the students, particularly the latter.

We have made every effort to carry out the desire of Mr. Bhulabhai J. Desai as expressed by him in his Foreword to the first edition. As the said Foreword has, to a certain extent, become out of date, we had a desire to invite him to write a fresh one: but, unfortunately his incarceration has made it impossible. We are, therefore, obliged to put in the same old Foreword even in this edition.

We have brought the book upto date, particularly the Part which deals with the Constitutional Law of India. We have, to a certain extent, elaborately discussed *Federalism* as it is embodied in the seven (federal) constitutions of the World, and as it is sought to be made applicable to India. We have, also, discussed the case-law on the Government of India Act.

We have made some changes in the arrangement of the Book. The Part dealing with the English Constitutional law is placed first; then follows that portion of the other Part which deals with the Indian Constitutional Law. The text of the Government of India Act is given at the end; and, after each section of the Act, the appropriate references to the commentary are given. We hope this arrangement will be useful to the practitioners and to the students, as well.

We express our thanks to our friends at the Bombay Bar for making various suggestions for the preparation of this edition.

80 Esplanade Road, Fort, Bombay; }
The New Year's Day,
October 30th, 1932.

J. N. V.
M. M. G.

P R E F A C E

(SECOND EDITION)

We owe an expression of our sense of satisfaction to the public in general, and to the students in particular for the warm reception they gave to the first edition of this Work. We also owe an apology to them for being a little late in bringing out the second edition inspite of their demand for the same. The delay in that behalf occurred as we waited for the publication of the Report of the Indian Statutory Commission (commonly known as Simon Commission) appointed by the then Parliament in 1928 under the Government of India Act.

As desired by Mr. Bhulabhai J. Desai in his foreword to the first edition of this treatise, we have ventured upon a fuller and detailed discussion of various subjects in both the parts hereof.

Our Mr. Gharekhan had, after the publication of the first edition, occasion to lecture to students of the Sir Lallubhai Shah Law College, *inter alia*, on this very subject. His experience as a Professor of law has enabled us to realise the practical difficulties of the students and with the benefit of the said experience, we have revised and enlarged the Book; we have re-written many portions in the first part, and practically we have re-written the second part hereof dealing with the *Constitutional Law of England*. We have also added new chapters and enlarged many points on Parliament, the various types of Unitary Constitutions, *e. g.*, those of France and Italy, on Federal Constitutions like those of the United States of America and Switzerland and on the various types of Constitutions of the self-governing Dominions of the British Empire, *e. g.*, Canada, Australia, South Africa, *etc.*; thereby we have brought this Book up to date. Owing to such additions and alterations, the size of the Volume has, almost, become double.

We have spared no pains to make this Volume intelligible to those for whom it is directly intended and we trust that it will create an interest in the study of law relating not only to the Indian and English Constitutions but also to the Constitutions of other countries and self governing Dominions. We also hope that this treatise will provide interesting and intelligible reading to the public.

As we are dealing with the Constitutional Law, as such, we have refrained from introducing politics; but at the same time, we have not hesitated to point out various chief merits and demerits (which out-number merits), anomalies, inconsistencies and practical difficulties in the actual working. We have also

...ssed various recommendations made by the Indian Statutory Commission ventured to point out the various difficulties that are likely to arise if the said recommendations are adopted by Parliament without substantial variation. Similarly, we have discussed the various announcements made in connection with the new constitution-making.

We express our thanks to our friends at the Bombay Bar for making various suggestions for the preparation of this edition. In particular, we are indebted to Mr. Bhulabhai J. Desai for allowing us to use his Foreword for this edition; also, to Prin. Dara S. Sethna and Mr. Hiralal D. Nanavati for having afforded us various facilities.

80, Esplanade Road, Fort;
Bombay, October 22nd, 1930. }

J. N. V.
M. M. G.

P R E F A C E

(FIRST EDITION)

It is an accepted principle that students of Law should be familiar with the law of the Constitution. Adopting this principle, the University of Bombay and other Universities have rightly prescribed Constitutional Law as part of their curricula for the LL. B. Examination. But we go further and say that not only the students but the other citizens of the country also should have a working knowledge of the Constitution of the Land.

The object of the present Work is to state in a clear and concise form the principles of the Constitutional Law of India and England. The Book is divided into two parts, the first dealing with the Indian Constitution and the second with the British Constitution. The text of the Government of India Act, 1919 together with all the amendments upto date is also given.

This branch of Indian Law is mainly embodied in the Government of India Act (the main Act of 1915, the amended Act of 1919 and subsequent amendments thereto) and Rules and Standing Orders made thereunder for the purpose of actual working of the administrative machinery. The principles of this Constitution are stated under separate headings in order that students may have a clear and speedy grasp of the subject; the individual sections are not reproduced *verbatim* but references are given in the margin.

Wherever necessary, special attention is devoted to the elucidation and discussion of important principles. As this work is mainly meant for students of Law, we have refrained from entering into detailed discussions; but at the

same time, we have not hesitated to point out the chief merits and demerits (which out-number the merits) in the Constitution. We have also pointed out the changes that are required to be made in accordance with the consensus of public opinion in India.

In India there are very few books available to students as well as to the public, on the subject. Ours is a modest attempt to supply the want. As we have discussed the subject from the constitutional and legal points of view, we hope the general public will also be able to take advantage of the work and if this is done, we will be more than satisfied for our humble efforts in this direction.

After this book was printed, we heard of the resolutions of 'no-confidence' in the Ministers of Madras and Bengal being moved in the respective Legislative Councils. As the principle of joint liability is operative in Madras there was only one resolution against the Ministry as a whole. Though the majority of non-officials favoured this resolution it was lost by opposition of the Government *bloc*. In Bengal, the resolutions were carried and on the Governor accepting them the Ministers have resigned according to the established convention. The Governor is, therefore, obliged to take up the administration of the Transferred Subjects. This illustrates the trend of public opinion towards Diarchy in the country.

The public press also informs us that a resolution in the Council of State for establishing a Supreme Court in India, replacing substantially the Privy Council in England, was similarly lost by Government opposition.

The General Index is exhaustively prepared; as it is common to both the parts of the Book, the readers can simultaneously refer to topics common to both the Constitutions.

We express our thanks to our friends at the Bombay Bar for making various suggestions for the preparation of this work. In particular, we are indebted to Mr. Bhulabhai J. Desai for having accepted our invitation to write a *Foreword* to this Book.

80, Esplanade Road, Fort, }
Bombay; August, 1927. }

J. N. V.
M. M. G.

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PART II

Constitutional Law of India

THE CONSTITUTIONAL LAW OF INDIA & ENGLAND

PART I

THE CONSTITUTIONAL LAW OF INDIA

CHAPTER I

INTRODUCTORY

Development of Indian Constitutional Government

1. It is a matter of common knowledge that Britishers first came to India in the 17th century, principally as traders and in course of time acquired a territorial government of India. In this small treatise, however, we are not dealing with that branch of history. What we have to consider here is the growth of British constitutional government in India, the various stages through which it passed and the nature and extent of the present system of government.

For a proper understanding of this vital question, it is necessary to cast a cursory glance at the various periods in the constitutional history of India, and to mark the constitutional developments that have taken place therein from time to time.

2. The constitutional history of India can be divided into four periods: (I) The period of Charters from about 1600 to 1765; (II) the period of Territorial Sovereignty from about 1765 to 1857; (III) the period of Sovereign Government by the Crown from 1858 till 1909, and the beginning of a Constitutional Government by the Crown from 1909 to 1919; and (IV) the present period of the beginning of the representative and partially responsible government loosely called "Home Rule", but strictly speaking a 'dual government.' The new constitution that will hereafter be framed is expected to add an important period in the development of the Constitutional Government of India.

3. (I). **Period of Charters (1600-1765):** During the first period, several charters were granted by Queen Elizabeth and her successors to the East India Company for the purpose of exclusive trade with India. There were in all

thirteen charters granted during the period. The first Charter of 1600 deserves some attention. The whole aim and object of Britain was to monopolise the trade in India. A very strong Dutch East India Company was formed in those days with the similar object of monopolising the trade in India. The said Charter of 1600 desired to meet the said competition and it being the first Charter which established the British association with India deserves some notice. The said Charter granted the necessary permit to 'traffic and use the trade of merchandise,' 'to assemble themselves in any convenient place, to make *reasonable laws and ordinances* for the good government of the East India Company and of all officers employed or to be employed, for the better advancement and continuance of the said trade and traffic,' 'to impose such pains, punishment and penalties by imprisonment or by fine as might seem necessary or convenient for observation of the laws and ordinances and to have exclusive right to such traffic and trade.'

It may be noted that a very important restriction was imposed on the Company's powers of making laws and ordinances. It provided that the laws and punishments were "to be reasonable and not contrary to the laws, statutes or customs of the English realm."

4. Constitutional point: This Charter deals with some important constitutional points. At present, we have nothing to do with the constitution or the privileges of the Company. We have to note only the legislative powers conferred upon the Company. The main provisions of such legislative powers with their significance have been referred to hereinabove.

In effect, the roots of the British Government in India can be said to have been laid with the powers contained in the Charter of 1600.

5. Charter of 1661: Another important Charter of the said period to which attention must be drawn is one of 1661. This Charter gave powers to the Company for the purposes of (1) coining money, (ii) administration of justice, and (iii) punishing interlopers.

6. Constitutional point: It also empowered the Company to appoint Governors' Councils and other officers for their government. The Governors and Councils were empowered with the administration of justice in all causes, whether civil or criminal, according to the laws of the Kingdom and to execute judgement accordingly.

It empowered the Company also to make peace or war with non-Christians, to erect fortifications and to seize interlopers.

7. Its Constitutional significance was that it extended the various regal and legal powers conferred upon the Company by the first Charter of 1600. With these extended powers, the root of the British Government in India gained strength of a better and permanent nature.

8. **British (born) Subjects:** Every Charter, which gave the Company power to administer justice, made special provisions and reservations in favour of British (born) subjects.

9. **The Charter of 1669** granted the port of Bombay to and enlarged the administrative, judicial and other powers of the Company. It also invested the Company with civil and military government.

10. **Rupees :** The Charter of 1677 granted to the Company the power to establish a mint at Bombay for the purpose of coining money to be called Rupees.

11. **The Charter of 1683** gave the Company the powers of declaring war and making peace with heathen nations; and the King established a Court of Justice with *maritime* jurisdiction. The Courts were empowered to adjudge and determine the cases according to rules of equity and good conscience and the laws and customs of merchants.

12. **Judge-Advocate :** During the Court-Martial trial of Gahrwalli Military Soldiers held in June 1930, a Judge-Advocate was appointed and therefore it is necessary to invite the attention of the reader to the provision made for the appointment of a Judge-Advocate in the said Charter of 1683. The President of the Council at Madras was appointed Judge-Advocate till the arrival of the permanent incumbent of the said office. It is needless to state here that the said arrangement caused dissatisfaction.

13. **The Charter of 1687** empowered the Company to establish a Municipality and a Mayor's Court at Madras. It also established a Court of Record with power to try civil and criminal cases.

Various subsequent Charters extended the powers of the Company, established Municipalities at Bombay and Calcutta, empowered them to establish Courts of Requests (similar to the present Small Causes Courts) at various places, gave powers to cede territories, and created *Probate* and *Testamentary* jurisdiction.

{ As the Company derived its powers, privileges, rights and liberties by Charters the period is known as that of Charters.

14. **Constitutional position:** The question arose whether the various rights and privileges which were conferred upon the East India Company by the Charters granted by the Crown were within the powers of the Crown. Some persons contended that Parliament alone had the power of conferring such rights and privileges. This point was for the first time decided by Lord Chief Justice Geffreys (the East India Company vs. Sandys), whereby two principles were laid down, viz., (1) that by the Laws of Nations, the regulation of trade and commerce are reckoned *inter juris regalia* (i.e., the prerogative of the Crown);

THE CONSTITUTIONAL LAW OF INDIA & ENGLAND

and (2) that though by the laws of the realm monopolies are prohibited, certain monopoly is permitted by the usages and practice of the country. Subsequently, the Privy Council also decided the same point laying down that the Crown can grant such Charters.

However, in 1694 the matter came up for discussion before Parliament. They, in effect, resolved "that all subjects of England have equal rights to trade with the East Indies unless prohibited by Acts of Parliament." Macaulay, thereafter, expressed himself by saying "it has ever since been held to be sound doctrine that no power but that of the whole legislature can give to any person or to any society exclusive privilege of trade with any part of the world."

Practically, owing to the aforesaid resolution of Parliament, the practice of giving monopoly of trade exclusively to any one corporation or society by a Royal Charter ceased. Whatever steps were taken subsequently in the direction of giving monopoly, rights, privileges, or powers, were taken by an Act of Parliament.

15. (II). Period of Acts (1765-1857): This period is known as that of the Acts, the reason being that the said period was regulated by various Acts of Parliament, whereas the first was regulated by Charters granted by the Crown. The important Acts were those of 1773, ¹⁷⁶⁵1784, 1793, 1800, 1833, and 1853.

16. Territorial Sovereignty: In the year 1675, Clive obtained the Sanad of Divani from the Mogul Emperor, i.e., the right to collect revenues in Bengal with control over Divani Adalat; and this gave them the power of 'purse.' They had already acquired the power of sword and this additional power marks the *territorial sovereignty* with a legal basis. At that time, the Company was placed almost in insolvent circumstances though it had a decent income. The reasons are well known. This confusion led the Home Government to make confidential inquiries as a result whereof the Regulating Act of 1773 was passed.

17. The Regulating Act of 1773: By this Act, a Governor-General and four Councillors were appointed for the government of the Presidency of Bengal. The whole of the civil and military government of all the territorial acquisitions in Bengal, Bihar and Orissa was vested in the said Governor-General and Council. It also invested the said Governor-General and Council with the powers of superintending and controlling the government and administration in the Presidencies of Madras and Bombay. The government at Bombay and Madras could not, under the provisions of the said Act, commence hostilities or make or declare war or conclude treaties with any Indian Ruler or Power without the previous consent of the Governor-General and Council unless for so doing there was not sufficient time to obtain the previous permission.

Before this Act, the Presidencies of Bengal, Bombay, and Madras had for the

purposes of the administration of each Presidency a separate and independent Governor and a Council ; each Government was autonomous within its own Presidency and only subject to the control of the Directors at 'Home'.

18. Federalism and Unitarianism : Before the Act of 1773, there were elements of federalism in the constitution of the Company as each Presidency was absolutely independent of the other and autonomous within its own territorial limits. In an unitary type of government, there is always concentration of the powers of government in a central body. The Act of 1773 created such centralisation and vested centralised power in a Governor-General and Council at Fort William. This provision in the Act introduced the unitary type in the British Government in India.

19. Courts of Judicature : The said Act empowered the Crown to establish, by Royal Charter, a Supreme Court of Judicature in Bengal. This provision deprived the Company of its power to have its own Court and established a King's Court. Civil, criminal, admiralty, ecclesiastical and testamentary jurisdictions were granted to the Supreme Court of Judicature. But it was provided that the said Court had no jurisdiction over the Governor-General or any Councillor. A provision was made for an appeal to the Privy Council.

20. Ordinances and Regulations : This Act empowered the Governor-General and Council to promulgate necessary Ordinances and Regulations for good government as should (1) be deemed just and reasonable, and (2) not be repugnant to the laws of the Realm. (Ss. 36 & 37).

In short, and principally by the said Act, a Governor-General with four Councillors was appointed and to him the whole civil and military government was entrusted; the relations of the Governor-General and other Governors were defined, the Crown was empowered to establish by Royal Charter a Supreme Court of Judicature in Bengal with powers to exercise civil, criminal, testamentary, admiralty and ecclesiastical jurisdictions ; powers were granted to the Governor-General to frame necessary rules, issue Ordinances and Regulations for good order and better government and limitations were placed on the Company's servants on receiving bribes and engaging themselves in private trade.

21. The Act of 1781 : In its working, the Act of 1773 created various difficulties and on many occasions the Judiciary and the Executive Government came into conflict. Another Act, being the Act of 1781, had to be passed whereby the necessary difficulties were removed and the relations between the Executive Council and the Judicial Courts were defined. Certain other alterations therein also removed possibilities of confusion.

22. Move towards centralisation: The Act of 1784 : This Act empowered the Governor-General in Council at Fort William in Bengal to

superintend, control and direct the several Presidencies and Governments (then existing or thereafter to be created or established in the East Indies by the United Company) in all such points as relate to any transaction, powers, war, peace or to the application of the revenues or forces of such Presidencies and settlements in times of war or any such other points as would from time to time be specially referred to the Court of Directors of the Company for their superintendence and control. In effect, the constitution was almost entirely changed both in the Home Government and the Government of India. Indirectly, at Home, the Government was placed much under *subordination* to a body representing the British Government. In India, the system resembling the present system of Executive Councils and their subordination to the Home Government was started. It can be said that the germs of "*double Government*" originated from the said Act.

23. Further pieces of Legislation till 1807 made certain alterations. By the East India Company Act, 1784, otherwise known as the Pitt's Act, six Privy Councilors were appointed to act as Commissioners for the affairs of India. The Act of 1807 gave powers to the Governor in Council at Bombay and Madras to frame rules, make Regulations, etc. The Act of 1815 also effected certain changes in the internal administration. The only additional change was that of providing Church Establishment in India. The Act of 1823 established a Supreme Court at Bombay almost similar to one at Calcutta.

24. Various Regulations were made and promulgated in the year 1817, pursuant to the powers conferred upon the Government by the Act of 1813. Occasionally, action is taken even now under some of those Regulations.

25. Constitutional issue : Legal Opinion is divided on the question whether the Regulations referred to in para 24 *ante* can be said to have been impliedly repealed by the Royal Proclamation of 1858 which has the same effect in law as an Act of Parliament. (Halsbury, Vol. 7, para 18; Hailsham Edition, Vol. 6, para 776). There is an old Bengal decision which, in effect, lays down that such a Regulation cannot be said to have been repealed by such Royal Proclamations. This question, however, has not been brought prominently before any Court of Law and therefore in the absence of any recent authority the matter does not appear to be free from doubt.

26. By the Charter Act of 1793, steps were taken towards complete centralisation. Even penalty was imposed on Governors for disobedience.

27. By the Government of India Act, 1800, provisions were made for establishing, by Charter or Letters Patent, a Supreme Court of Judicature at Madras with full powers with civil, criminal, admiralty and ecclesiastical jurisdictions, and some other minor provisions were made for the better administration of India.

28. By the Act of 1832, known as the Indian Bishops & Courts Act, 1832, provision was made for the appointment of Bishops and for establishing a Supreme Court of Judicature at Bombay in the same form and with the same powers and authorities as were then enjoyed by the Supreme Court of Judicature at Fort William in Bengal.

29. By the Act of 1833, the territorial possessions were said to be "*in trust for His Majesty, His heirs, etc., for the services of the Government of India*". Monopoly of trade was abolished; the Governor-General received the title of Governor-General of India; changes were made in the Council of the Governor-General; a separate Law Member was for the first time added to the Council; but the said Law Member was not allowed to sit and vote except at meetings for making Laws and Regulations; a separate Presidency of Agra was established and important alterations were made with reference to the legislative powers of the Government.

The section relating to the creation of the new Presidency of Agra was repealed by the subsequent Act. (5 & 6 Will. 4, ch. 52).

The Act designated the said Governor-General of Bengal and Council as the Governor-General of India in Council. "The Governments of Madras and Bombay were drastically deprived of their powers of legislation and left only with the right of proposing to the Governor-General in Council projects of the laws which they thought expedient." By this provision, the Governor-General of Bengal became the Governor-General of India with the sole powers of making laws for British India. The superintendence, direction and control of the whole civil and military government in India was vested in him. Governors and their Councils were deprived of their powers of creating any new office, granting any salary, etc., without the previous sanction of the Governor-General in Council. Similar restrictions are found in the Government of India Act. The Local Governments were merely the agents of the Governor-General in Council.

These provisions, to a very great extent, completed the process of centralisation.

It is important to note that the powers and privileges of, and the restrictions on the Indian Legislatures (Act of 1833) were practically the same as those exist at present. The history of Indian Legislature really dates from 1833. Some of the provisions of this Act exist even in the present Act.

30. Position of the Company summarised: In *Gibson vs. The E. I. Co.* (5 Bing. N. C. 262) Tindal, C. J. summarised the position of the Company in the following words:

"The Statute 9 and 10 Will. 3, ch. 44 and the Charter of incorporation granted by the King under the powers of that Act form the foundation of the privileges of the present United East India Company. And, from the provisions made by that Statute, it is evident that the Company was established originally and in the first instance for the purpose of trade only; namely, exclusively trafficking and using the trade of merchandise to and from the East Indies and in all places between the Cape of Good Hope and the Straits of Magellan, and with no other object or design.

"But, without adverting to various enlargements by the Legislature in subsequent reigns of the term for which the Charter was originally granted, it will be sufficient for the present purpose to observe that about the commencement of the reign of George III, a question arose between the Government and the East India Company as to the claim set up by the latter to the possession of the territorial acquisitions in India which had been made by them—a claim inconsistent with the general principle prevailing in the law both of this and other States, namely, that all conquests made by subjects must necessarily belong to the Crown. And, in consequence of this contention an agreement was entered into between the Company and the public that the territorial acquisitions and revenues lately acquired in the East Indies should remain in the possession of the Company and their successor during the term therein mentioned, an agreement which was carried into effect by the Statute 7 Geo. 3, ch. 57. The term therein mentioned was afterwards enlarged and the possession and government of the territorial acquisitions continued in the said United Company by subsequent Acts of the Legislature, down to the present time; without prejudice, however, as declared by the preamble to the Statute 53 Geo. 3, ch. 155, s. 61 to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same, or to any claim of the said United Company to any rights, franchise, or immunities.

"Upon this legislative authority, subject, however, to such control of the Crown as is provided by several statutes, does the right of the Company to the possession and government of the territories acquired in the East Indies depend. And from the same legislative authority without referring to many express provisions in the subsequent statutes, it is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other; namely, power to carry on trade as merchants (subject only to the prerogative of the Crown to be exercised by the Board of Commissioners for the Affairs of India) and power to acquire and retain and govern territory, to raise and maintain armed forces

by sea and land, and to make peace or war with Native Powers of India.”*

31. The Act of 1853 was the last important Act of the said period whereby the Government was authorised to create a separate Presidency. The Law member was allowed to sit, to be present and to vote at all meetings of the Executive Council. Important alterations were made in the machinery of the Indian Legislature by the said Act. The beginning of the Legislative Council was made by appointing a council of 12 persons for the purposes of legislation. The sittings of this *Legislative Council* were made public and their proceedings were published. Various restrictions were imposed on the said Council, many whereof prevail even to-day.

Another marked feature of that Act was that the *covenanted Civil Service* was thrown open to general competition.

32. The Act of 1854 is the first Act of the said year which empowered the Governor-General in Council with the previous sanction of the Home Government to create Chief Commissionerships.

33. The last Act of this period was the Act known as the Government of India Act, 1854. By the said Act, provision was made for the mode of passing Letters Patent and other Acts by the Crown relating to India. The said Act also invested the Governor-General of India in Council with certain powers.

34. (III). **Period of Sovereign Government by the Crown:** The Government of India Act, 1858: The mutiny of 1857 knelled the curfew bell of the East India Company and the system of “Double Government”. The Crown took over the Government of India. After the Proclamation of 1858 was issued, the Government of India Act, 1858, was passed. Thereunder the reign of the Imperial Government began.

At present, the Royal Proclamation of 1858 has raised many constitutional issues.

* And it was held that a contract relating to the pension of a retiring officer was made by the Company in their political character as governors and not in their trading character as merchants.

In the *Secretary of State in Council vs. Kamachee Boye Sahaba*, 7 M.L.A. 476; 13 Moo. P.C. 22, (1859) their Lordships of the Privy Council followed the rulings in former cases which decided that the East India Company had powers of sovereignty which were distinct from their powers to carry on trade, and added that the Statute 3 and 4. Will. 4, ch. 85 in no degree diminished the authority of the Company to exercise on behalf of the Crown of Great Britain and subject to the control thereby provided, these delegated powers of sovereignty.

35. The Government of India Act, 1858, declared that India was thenceforth to be governed directly by and in the name of the Queen and Her successors, technically called the Crown, through one of the principal Secretaries to be named the Secretary of State for India, to whom the powers of the Board of Control and Directors of the East India Company were transferred. The Secretary of State for India was to be assisted by a Council of 15 members, to be termed the Council of India, 8 whereof were to be appointed by the Crown and the rest to be elected by the Directors of the East India Company. The only reason of giving a Council to the Secretary was to satisfy the East India Company by giving them some representation in the Government; the Council so started yet exists, though on different lines, apparently without the same powers, privileges or rights, but to all intents and purposes with a great voice in the administration. Vacancies were to be filled in by the Crown in cases of Crown appointments. The members were entitled to remain in office during *good behaviour*, i.e., they were liable to be removed on an address by both Houses of Parliament. They had no right to sit in Parliament and to vote. They were denied this right on the ground that they should be non-party men and should not involve themselves in politics. The Council had powers somewhat similar to those of the present Council which shall be discussed while dealing with the Government of India Act as amended by the Act of 1919.

36. This Act (of 1858) laid the foundations of the present Government of India Act. In the year 1861, important Acts of Parliament were passed, they being the Indian Civil Service Act, the Indian Councils Act and the High Courts Act. The Indian Civil Service Act properly regulated the services and validated the various irregular appointments in the past. By the said Act, several appointments were reserved for the members of the covenanted civil service.

37. By the Indian Councils Act, the constitution of the Governor-General's Executive Council was modified and the Indian Legislatures were remodelled but out of the five members in the Governor-General's Executive Council, three were to be appointed from the Services and one was required to be either a Barrister or an Advocate.

By this Act, the Governor-General got the powers of appointing the President of the Council in his place and stead with all his powers when he was to leave the headquarters; he was also empowered to invest himself with all the powers of the Governor-General in Council when he was out of the capital; however, he was not allowed to use such powers with reference to legislation. It is needless to state that the Governor-General has got similar powers even under the present constitution.

38. By the Indian Councils Act, 1861, various changes were made. The [Presidencies of Madras and Bombay got back their powers of legislation but with two limitations: (1) They could not make or take into considera-

tion certain laws without the previous sanction of the Governor-General; and (2) the Acts passed by Local Councils could not be valid unless they have received the assent of the Governor-General in addition to that of the Governor. These restrictions prevail in one form or another even at present. The Legislatures under this Act were not deliberative bodies. They could not inquire into grievances, call for information or examine the conduct of the executive. They were merely *advisory* bodies and sowed the seed of Representative Institutions. That character prevailed till the Minto-Morley period and the official majority in the Imperial Legislative Council was maintained.

39. By the High Courts Act, 1861, the Crown was empowered to establish by Letters Patent, High Courts of Judicature at Calcutta, Bombay and Madras in place of the old Supreme and Sadar Courts. The tenure of office of the Chief Justice and Judges was one *during pleasure* which continues even now. Such tenure of office for judges is objected to on the ground that they cannot have full judicial freedom. The High Courts of Bombay and Madras are under the Local Government but the Indian Statutory Commission appointed in 1928 has recommended the transfer thereof to the Central Government.

It must have been noted that various alterations made in the respective spheres were to a certain extent on broader lines, but in consonance with the principles of Imperial Government. By this Act, better provision was made for the Executive Councils of the Governor-General and other Governors. In the Governor-General's Executive Council, the Commander-in Chief was appointed an additional member. In cases of *emergency*, the Governor-General was armed with powers of making Ordinances, which were to remain in force for six months (section 23). Such emergency legislative powers still remain vested in the Viceroy, (section 72 of the Government of India Act, 1919). This subject will be further discussed under section 72 of the present Act. The years 1930 to 1933 will remain as eventful years during which the Government was practically carried on under such emergency legislation. Bombay and Madras Governments got back their powers of legislation which were abolished during the second period by the Act of 1833. The Local Legislatures were not empowered to control, by their Acts, the jurisdiction or procedure of the High Courts. This was left partly with Parliament and partly with the Central Legislative Council.

Various Acts were, thereafter, passed making alterations whereby the Indian High Courts Act of 1861 was amended, the legislative powers of the Governor-General's Council were extended and the Secretary of State was empowered to fill in vacancies in the India Council. On special reasons being shown, he was also empowered to appoint any person having special knowledge of any subject or having either special or professional qualifications, in

the Legislatures. The period of the office of the Council was fixed at 10 years but official members were to continue during good behaviour. Various additions, alterations and reductions were made in their own spheres. The important Acts herein referred to were the Indian High Courts Act, 1865, the Government of India Act, 1865, similar Act of 1873, the Indian Councils Act, 1874, the Councils of India Act, 1875, the Royal Titles Act, 1876, the Indian Marine Service Act, 1884, the Council of India Reduction Act, 1889, the India Council Act, 1892, and the Indian Councils Act, 1904.

40. The Act of 1873 formally dissolved the East India Company; the Indian Councils Act added one more member to the Executive Council of the Governor-General; and the Royal Titles Act, 1876, empowered the Queen to assume the title of Queen-Empress of India.

41. **Minto-Morley Reforms:** The third Period includes the Minto Morley Reforms as a result of the liberal policy of the then Governor General and the Secretary of State and important Acts were passed by Parliament. This piece of legislation marks the period of the beginning of a 'Constitutional Government.' It was impossible for the statesmen to take a long leap and therefore they gave powers which they possibly could; but it made a good beginning. Obligations are, also, due to Indian politicians for their wise and guarded propaganda for achieving the object. The said Indian Legislative Councils Act, 1909, introduced changes both in the constitution and functions of Indian Legislative Councils. The most important elements in a Council are: (1) number of members, (2) proportion of *official* and *non-official* members and (3) methods of election and appointment. Changes were made in all these three spheres. The following table will show the number of members at various stages:

Councils	Maximum Number of members before 1892	Similar under the Act of 1892	Similar under the Act of 1909
Governor-General's Council	12	16	60
Council of Bombay, } Madras and Bengal }	8 each	20 each	50 each
United Provinces	...	15	50
The Punjab	...	...	30
Burma	...	...	30
E. B. & Assam	...	...	50

42. It may be noted that after the well-known Partition of Bengal was removed by a declaration made by His Majesty the King-Emperor at the Durbar held in December 1911, a separate Province of Bihar and Orissa was formed.

43. (i) For ascertaining the total strength of each Council, *ex-officio* members should, also, be considered. (1) For the Governor-General's Council, there were eight *ex-officio* members—six being the members of his Cabinet, the Commander-in-Chief and the Lieut. Governor or the Chief Commissioner of the province in which the Council assembled. (2) At Bombay and Madras, there were 4 such members—3 being the members of the Executive Council and the 4th being the Advocate-General. (3) For Bengal and Behar & Orissa, there were 3 such members of their respective Executive Councils. The Governor-General and the Governors were appointed Presidents of their respective Councils.

(ii) **Proportion of non-official and official element :** The Act of 1861 required both these to be equal in the Imperial Council and in those of Bombay and Madras and one-third of the additional members of the other Councils were required to be non-officials. An official majority was, almost always, maintained. By the Acts of 1902 and 1912, *non-official majority* was required to be maintained in the *provincial councils*, but official majority was maintained in the Imperial Council.

(iii) **Mode of Representation :** This Act introduced the principle of election, as until then there had been no element of election in the constitution of the Councils, and all the members were nominated. Though this element of election was introduced, the *franchise* was not placed on as liberal a basis as at present. Several public bodies, like Local Boards, were given a right to send representatives of their own. A separate electoral right was given to Muslims; and to secure the representation of some minorities, the Government were authorized to nominate their representatives. In this way the representation of all the parties and classes was secured. There were certain restrictions—somewhat similar to those existing at present—placed on the eligibility of candidates for election.

44. **Functions of Legislative Council :** So much for the changes in the constitution of Councils. Now, we shall deal with their functions. Mainly, there are three functions of a Legislative Council, viz., (i) *Legislative*, (ii) *Deliberative* and (iii) *Interrogatory*.

In respect of (i) *legislative function*, no changes were made. (ii) *Deliberative function* was strengthened on the popular side. Power of discussion over budget was granted, but the right of moving resolutions and dividing Councils, thereon was not given. Matters of general public interest were allowed to be demanded. (iii) The right of asking supplementary questions for the purposes of getting explanations or elucidating further facts in respect of the original question, was granted. But the President was armed with powers of refusing to reply without a previous notice.

The said Act also gave powers to make changes in the Executive

Government of the Provinces. By the said Act, it was, *inter alia*, provided that in Bombay and Madras, maximum four members may be appointed to constitute the Executive Council; but a condition was imposed that two of them must have been in the service of the Crown, at least, for 12 years prior to their appointment in the Council. An executive Council was created for Bengal, and a right was given for creation of such Councils in other provinces after having previously laid a draft of any Proclamation proposed to be made in connection with the creation of such Councils before each House of Parliament.

Another step forward was taken during this *regime* by appointing Mr. (late Lord) Sinha a Law Member of the Governor-General's Executive Council and two Indians in the Council of India in England.

The other important piece of legislation in this period was the Indian High Courts Act, 1911. The said Act raised the maximum number of Judges, empowered the Crown to establish other High Courts by Letters Patent and empowered the Government of India to appoint temporary additional Judges for not more than two years.

45. The Government of India Act, 1912, carried out the changes declared by His Majesty the King on December 12th, 1912. The seat of Government was transferred to Delhi from Calcutta, the partition of Bengal was cancelled, a new province of Bihar & Orissa was created and Assam was constituted a new Chief-Commissioner's province. The following provisions are also noteworthy. A Governor in Council of Bengal were appointed; certain powers were reserved with the Governor-General in Council in respect of the Presidency of Bengal; the appointment of (*ex-officio Member*) the Advocate-General in the Legislative Council of Bengal was kept optional, and the establishment of Legislative Councils for provinces under Chief-Commissioners was authorised.

The Government of India Act of 1915 was merely a consolidating Act and that of 1916 amended merely the Act of 1915 in some minor particulars.

This brings us to the end of the period of Imperialistic Government.

We now propose to marshal the Acts that were passed with reference to the constitution of executive government, legislature, etc.

In the first period, really speaking, there were general Charters, each Charter dealing with many points.

Relating to the Constitution of the Council of India (1869-1907), the important Acts were (1) the Government of India Act, 1869 (32 & 33 Vict. ch. 97); (2) the Council of India Act, 1876 (39 & 40 Vict. ch. 7); and (3) the Council of India Act, 1907 (7 Edw. 7, ch. 37),

Relating mainly to the Constitution of Imperial and Provincial Executive Governments (1865-1912), the important Acts were: (1) the Government of India Act, 1865 (28 & 29 Vict. ch. 17); (2) the Indian Councils Act, 1874 (37 & 38 Vict. ch. 91); (3) the Indian Councils Act, 1904 (4 Edw. 7, ch. 26); and (4) the Government of India Act, 1912 (2 & 3 Geog. 5, ch. 6).

Relating mainly to the Constitution of Imperial and Provincial Legislatures (1861-1918), the important Acts were: (1) the Indian Councils Act, 1861 (24 & 25 Vict. ch. 67); (2) the Indian Councils Act, 1869 (32 & 33 Vict. ch. 98); (3) the Indian Councils Act, 1870 (33 & 34 Vict. ch. 3); (4) the Indian Councils Act, 1871 (34 & 35 Vict. ch. 34); (5) the Indian Councils Act, 1892 (55 & 56 Vict. ch. 14); and (6) the Indian Councils Act, 1909 (9 Edw. 7, ch. 4). By section 8 of the said Act, it was laid down that it shall be read with the Indian Councils Acts, 1861 and 1892. It was, also, provided that these Acts, together with the Indian Councils Act, 1869, the Indian Councils Act, 1871, the Indian Councils Act, 1874, the Indian Councils Act, 1904, may be cited together as the Indian Councils Acts, 1861 to 1909.

Relating to the Constitution of the Indian Judiciary, (1833-1916), the important Acts were: the Act of 1833 (3 & 4 Will. 4, ch. 41); (2) the Indian High Courts Act, 1861 (24 & 25 Vict. ch. 104); (3) the Letters Patent for the Calcutta High Court, 1865; (4) the Indian High Courts Act, 1911 (1 & 2 Geog. 5, ch. 18); and (6) the Letters Patent of 1916 for the Patna High Court and similar Letters Patents for various other High Courts.

47. (IV). The Present Period: The Announcement of August 1917: The beginning of the present system of Government was made by the famous and important *Announcement made by the then Secretary of State for India* (Mr. Montagu) with the full concurrence of the British Cabinet, in the British Parliament on the 20th August, 1917. The said Announcement was in the following terms: "Policy of His Majesty's Government with which the Government of India are in complete accord, is that of the increasing association of Indians in every branch of the administration *and gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire.* They have decided that substantial steps in this direction should be taken as soon as possible, and that it is of the highest importance as a preliminary to considering what these steps should be that there should be a free and informal exchange of opinion between those in authority at Home and in India. His Majesty's Government have accordingly decided, with his Majesty's approval that I should accept the Viceroy's invitation to proceed to India to discuss these matters with the Viceroy and the Government of India, to consider with the Viceroy the views of Local Governments, and to receive with him the suggestions of representative bodies and others."

Owing to the political situation (not only in India but also in other parts of the world) created by the Great War, foresighted politicians and statesmen in England thought it wise to make that Announcement. It eased, to a certain extent the political tension in India; some persons in England cried 'Halt', but the late Lord Curzon silenced such short-sighted 'conservatives' by giving an effective reply to their cry in the House of Lords in the following words: "It is all very well to say that you ought not to raise these matters in time of war. My Lords, it is the war that raised them. You cannot unchain the forces which are now loosened and are at work in every part of the world without having a repurcussion which extends over every hemisphere and every ocean, and believe me, the events happening in Russia, in Ireland, in almost every country of Europe, the speeches being made about little nations and the spirit of nationality have their echo in India itself."

48. In the said Announcement, the phrase "*Responsible Government*" is used. "Self-Government", "Home-rule", etc., are, almost, convertible terms. "*Responsible Government*" means and implies that the executive government of the country must be responsible for their acts of commission and omission to, and must be under the control of the public through their elected non-official majority; in short, there must be *popular government* and if it loses the confidence of the public, it must give place to another popular government. If there is a majority of elected non-official representatives of the public in the legislature but if the executive government is *not* responsible to and under the control of such a legislature, the form of the Government is known as "*Representative Government*". Under the present Act, we have a combination of both; we shall discuss this subject while considering the Act.

49. With a view to take practical steps towards carrying out the *promise* given in the famous *Announcement* of the 20th August, 1917, Mr. Montagu and some other politicians came out to India towards the end of the same year. After having consulted various bodies in India, the then Viceroy Lord Chelmsford and Mr. Montagu submitted a joint report on Indian Constitutional Reforms to His Majesty's Government at Home in the following year. As a result of the recommendations contained in the said Joint report, a Bill was introduced in Parliament in 1919, and the same was referred to a joint Select Committee of both Houses of Parliament. After mature consideration, the same was passed into Law.

The present Government of India Act is really a consolidating Act. Till 1919, its various provisions were spread over many Acts.

50. **Salient Features of the Act.** By the Minto-Morley Reforms of 1909, some important constitutional changes were made: some provincial governments were to a certain extent, made representative ones; and the Imperial Legislative Council was granted some voice in the administration. The Mont-Ford Reform

of 1919 went a step further and introduced a system of *representative government* in the Government of India and a partial system of *responsible Government* in the Provinces. The changes wrought by this Government of India Act of 1919 are mainly as follows :

(1) **The Government of India or the Central Government:** It continued to be irresponsible to the Indian Legislature; it remained, as before, responsible to the Home-Government which is responsible to Parliament; but some other important changes were made. Though not placed under the control of the Indian Legislature, circumstances are created whereby it is placed under *popular influence*. Such *popular influence* is created by changes (i) in the *personnel* and *strength* of the Central Government, (ii) in the rights, liberties and functions of the Central Government or Government of India and (iii) in the constitution, powers, privileges, functions and procedure of the Central Legislature.

(2) **Provincial Government:** From the status of a *representative government* it was raised to the joint status of *representative* and somewhat *responsible* and *autonomous* government. It must be noted that full responsible government can not be said to have been granted by the said Act. The language of the Act is much guarded, and a strong Governor may construe it in his favour. As it is only a beginning of such government, which according to English opinion is foreign to Indian sentiments, the Home Government will *cautiously* construe the sections of the Act and thereby may unwittingly agree with any unscrupulous Governor. For the purposes of administration of the Provinces, various heads of administration *were reserved* for the Governor in Council subject to supervision and guidance of the Government of India and subject to the control of the "Home Government"; and some heads were *transferred* to ministers and the Governor subject to the control of the Legislature. Sec. 52 cl. (3) provides : "In relation to transferred subjects, the Governor shall be guided by the advice of his ministers, unless he sees sufficient cause to dissent from their opinion, in which case, he may require action to be taken otherwise than in accordance with that advice." The former heads are technically known as "*Reserved Subjects*". In respect of the former, there is only a *representative* form of government, and in respect of the latter, to a certain extent, "*responsible government*". Thus, it must have been noted that in practice two forms of government prevail; it is loosely called "*dual government*" or "*diarchy*". The consensus of public opinion is against "*Diarchy*"; some opine that the system should be given a trial though it is both unworkable and unnecessary. Even for these purposes, several heads of administration are reserved with the Government of India; they are termed *central heads*, and those for Provinces are termed *provincial heads*. Revenues, also, are divided, some having been allocated to the Indian Government and some to Provincial

Governments. As in the Central Government, so in Provincial Governments also, changes were effected in (i) the constitution of the Executive Government, (ii) the powers and functions of Provincial Governments and (iii) the constitution, powers, privileges and functions of Provincial Legislative Councils.

(3) Provisions relating to public Services in India were greatly modified.

These are the provisions regarding Government in India.

✓ (4) Changes were made in the constitution, powers, privileges, rights, liberties and functions of the "Home Government" in England. Salaries of the Secretary of State for India and his Parliamentary Under-Secretary *were made chargeable to the British treasury*: this change made Parliament to take more interest in Indian debates.

(5) Provision was made to appoint a Statutory Commission to enquire into the present working of the Reforms, and to consider how and what further instalment should be granted, as laid down in the Announcement of August 20th, 1917.

We will deal with these subjects in detail when we will deal with the Act:

We have noted in what respects changes were effected by the Act. Now we will consider the scheme of the Act.

51. The Scheme of the Act: The Act is divided into various parts, each part dealing separately with each head either executive, legislative, or judicial. These parts could be grouped together for the purpose of explaining or understanding the working of the Act.

Group I: The first three parts deal with the powers, functions, etc., of the "Home Government." We will explain these terms while dealing with the Act. The "Home Government" in England consists of "The Crown", "The Secretary of State for India" and "The Council of India".

Group II: Parts IV and VII deal with the Government of India and its powers, functions, etc.

Group III: Parts V and VII deal with Provincial Governments.

Group IV: Part VI deals with Legislatures, both Central and Provincial.

Group V: Parts VII and VIII deal with Civil Services.

Group VI: Part IX deals with Indian High Courts.

Group VII: Part VI deals with Ecclesiastical subjects.

The last parts XI and XII of the Act are general.

VARIOUS ROYAL PROCLAMATIONS

52. It seems various complications arose owing to the several Royal Proclamations. We propose to discuss such various constitutional complications arising therefrom at the respective places while discussing the Act. The convenience requires that all Royal Proclamations and all Royal Utterances with reference thereto should be compiled at one place. We propose to give here all such Royal Proclamations and Royal Utterances.

ROYAL PROCLAMATION OF 1858

(November, 1st, 1858)

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the Colonies and Dependencies thereof in Europe, Asia, Africa, America and Australasia, Queen, Defender of the faith.

1. Whereas, for divers weighty reasons, We have resolved, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled to take upon ourselves the government of the Territories in India heretofore administered in trust for Us by the Honourable East India Company:

2. Now therefore, We do by these Presents notify and declare that by the advice and consent aforesaid, We have taken upon ourselves the said Government; and We hereby call upon all Our Subjects within the said Territories to be faithful and to bear true Allegiance to Us, Our Heirs and Successors and to submit themselves to the authority of those whom We may hereafter, from time to time see fit to appoint to administer the Government of Our said Territories, in Our name and on Our behalf:

3. And We, reposing especial trust and confidence in the loyalty, ability and judgment of our right trusty well and beloved cousin and counsellor, Charles John Viscount Canning do hereby constitute and appoint him the said Viscount Canning, to be Our first Viceroy and Governor-General in and over our said Territories and to administer the Government thereof in Our name and generally to act in Our name and on Our behalf, subject to such Orders and Regulations as he shall from time to time receive from us through one of our principal Secretaries of State:

† 4. x x x x x x x

5. We hereby announce to the Native Princes of India that all Treaties and Engagements made with them by or under the authority of the Honourable East India Company are by Us accepted and will be Scrupulously maintained and We look for the like observance on their part:

† This para deals with Company's servants.

6. x x x x x x x x
 x x x We shall respect the Rights, Dignity and Honour
 of Native Princes as Our own; and we desire that they, as well as Our own
 Subjects, should enjoy that prosperity and that social advancement x x

7. We hold Ourselves bound to the Natives of Our Indian Territories by
 the same obligations of duty which bind Us to all Our other Subjects and those
 Obligations, by the Blessing of Almighty God, We shall faithfully and consci-
 entiously fulfil.

*8. x x x x x x x x

9. And it is Our further Will that so far as may be, Our Subjects of
 whatever Race or Creed, be freely and impartially admitted to Offices in Our
 Service, the duties of which they may be qualified, by their education, ability,
 and integrity duly to discharge.

10. We know, and, respect the feelings of attachment with which the
 Natives of India regard the Lands inherited by them from their Ancestors; and
 We desire to protect them in all Rights connected therewith, subject to the equi-
 table demands of the state; and We will that generally, in framing and adminis-
 tering the Law due regard be paid to the ancient Rights, Usages and Customs
 of India

†11 to 16. x x x x x x x x

17. When by the Blessing of Providence, internal Tranquility shall be
 restored it is Our earnest Desire to stimulate the peaceful industry of India, to
 promote Works of Public Utility and Improvement, and to administer its
 Government for the benefit of all Our Subjects residing therein. In their
 Prosperity will be Our Strength; in their Contentment Our Security, and in
 their Gratitude Our best Reward. And may the God of all Power grant to
 Us and to those in authority under Us, Strength to carry out these Our wishes
 for the good of Our People.

The Proclamation explained: This Proclamation was explained by Her
 Majesty the Queen herself in a letter written by her to Lord Derby; *inter alia*,
 she states: Such a document should breathe the feelings of generosity, bene-
 volence, and religious feeling, pointing out the privileges which the Indians will
 receive in being placed on an equality with the subjects of the British Crown
 and the prosperity following in the train of civilisation".

Note: English Constitutional Doctrines made applicable: It must have
 been noted that the Royal Proclamation of 1858 invited the Indian people to

* This para deals with Religious Toleration.

† These paras deal with the Mutiny and Royal Pardon.

bear allegiance to the Crown on the strength of various promises given therein. It may be contended that no specific mention is made of any doctrine in the said Proclamation; but such a contention might be met with by the words and statements of H. M. the Queen herself. The Letter hereinabove quoted clearly shows (the important statement in the said letter being 'pointing out the privileges which the Indians will receive *in being placed on an equality with the subjects of the British Crown*') that the British constitution—written and unwritten—(these words occur even in sec. 65) is made applicable to India. Consequently, Acts like Magna Charta, Bill of Rights and such other important constitutional Charters, doctrines and conventions are made applicable to and form part of the Indian Constitution.

ROYAL PROCLAMATION OF 1908*

November, 2nd, 1908

Edward the Seventh	x	x	x	x	x	x	x
x x x	x	x	x	x	x	x	x
(1) x for x	x	x	x	x	x	x	x
† (2) x in x	x	x	x	x	x	x	x
† (3) x x	x	x	x	x	x	x	x

(4) In the great Charter of 1858 Queen Victoria gave you noble assurances of Her earnest desire to *stimulate the peaceful industry of India, to promote works of public utility and improvement, and to administer the Government for the benefit of all residents therein.* x x

‡ (5) x x	x	x	x	x	x	x	x
§ (6) x x	x	x	x	x	x	x	x
¶ (7) x x	x	x	x	x	x	x	x
§ (8) x x	x	x	x	x	x	x	x
(9) x x	x	x	x	x	x	x	x

x x x x Important classes among you, representing ideas that have been fostered and encouraged by British Rule, claim equality of citizenship, and a greater share in legislation and Government. The politic

* This proclamation was made at the time of celebration of the Golden Jubilee of the Royal Proclamation of 1858.

† Recital of the Crown having taken over the administration of Government of India.

‡ This para states that all promises regarding religious toleration etc. are observed.

§ This para refers to terrorist parties.

¶ This para refers to Royal Clemency.

§ This para refers to removal of racial distinctions.

satisfaction of such a claim will strengthen, not impair, existing authority and power. Administration will be all the more efficient x x x

x	x	x	x	x	x	x	x
‡ (10)	x	x	x	x	x	x	x
§ (11)	x	x	x	x	x	x	x
(12)	x	x	x	x	x	x	x

H. I. M. George V's letter dated 24th May, 1910: When H. I. M. George V ascended the throne in 1910, He sent a Message to the Indian people and Princes by his letter of 24th May, 1910. After referring to the Royal Proclamations of 1858 and 1908, He says: These are the Charters of the noble and benignant spirit of Imperial Rule, and by that spirit in all My time to come I will faithfully abide". This expression confirms the views of those who contend that the said Royal Proclamations should be construed as Charters and real effect should be given to the expressions and promises given therein.

Announcement at the Coronation Darbar, 1911: On 12th December, 1911, an Announcement was made. In para 9 thereof it is stated: "Finally, I rejoice to have this opportunity of renewing in My own person those assurances which have been given you by My predecessors of the maintenance of your rights and privileges and of My earnest concern for your welfare, peace and contentment,"

The para 10 runs as follows: "May the Divine favour of Providence x x v assist Me in My utmost endeavour to promote their happiness and prosperity."

ROYAL PROCLAMATION OF 1919

George the Fifth, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India To My Viceroy and Governor-General; to the Princes of the Indian States and to all My Subjects in India of whatsoever race or creed, Greeting

1. Another epoch has been reached to-day in the Annals of India. I have given My Royal assent to an act which will take its place among the great historic measures passed by the Parliament of this Realm for the better government of India and for the greater contentment of her people. The Acts of 1773 and 1784 were designed to establish a regular system of administration and justice under the Honourable East India Company. The Act of 1883 opened the door for Indians to public office and employment. The Act of 1858 transferred the administration from the Company to the Crown

‡ This para refers to fidelity of Indian Troops.

§ This para refers to visits of H. R. H the Prince of Wales.

and laid the foundations of public life which exist in India to-day. The Act of 1861 sowed the seed of representative institutions; and the seed was quickened into life by the Act of 1909. The Act which has now become law entrusts elected representatives of the people with a definite share in Government and points the way to full representative Government hereafter. If, as I confidently hope, the policy which this Act inaugurates should achieve its purpose, the results will be momentous in the history of human progress; and it is timely and fitting that I should invite you to-day to consider the past and to join Me in My hopes of the future.

2. *Ever since the welfare of India was confided to Us it has been held as a sacred trust by Our Royal House and Line.* In 1858, Queen Victoria of revered memory solemnly declared herself bound to her Indian subjects by the same obligations of duty as to all her subjects; and she assured them religious freedom and the equal and impartial protection of law. In his message to the Indian people in 1903, my dear father, King Edward VII announced his determination, to maintain unimpaired the same principles of humane and equitable administration. Again, in his proclamation of 1908 he renewed the assurances which had been given fifty years before, and surveyed the progress which they had inspired. On My accession to the throne in 1910, I sent a message to the Princes and Peoples of India acknowledging their loyalty and homage, and promising that the prosperity and happiness of India should always be to Me of the highest interest and concern. In the following year, I visited India with the Queen-Empress and testified My sympathy for her people and My desire for their well being.

3. While these are the sentiments of affection and devotion by which I and My predecessors have been animated, the Parliament and the People of this Realm and My officers in India have been equally zealous for the moral and material advancement of India. We have endeavoured to give to her people the many blessings which Providence has bestowed upon Ourselves. But there is one gift which yet remains, and without which the progress of a country cannot be consummated: the right of her people to direct her affairs and safeguard her interests. The defence of India against foreign aggression is a duty of common Imperial interest and pride. The control of her domestic concerns is a burden which India may legitimately aspire to taking upon her shoulders. The burden is too heavy to be borne in full until time and experience have brought the necessary strength; but opportunity will now be given for experience to grow and for the responsibility to increase with the capacity for its fulfilment.

4. I have watched with understanding and sympathy the growing desire of My Indian people for representative institutions. Starting from small beginnings this ambition has steadily strengthened its hold upon the intelligence of the

country. It has pursued its course along constitutional channels with sincerity and courage; it has survived the discredit which, at times and in places, lawless men sought to cast upon it by acts of violence committed under the guise of patriotism; it has been stirred to more vigorous life by the ideals for which the British Commonwealth fought in the Great War and it claims support in the part which India has taken in our common struggles, anxieties and victories. In truth, the desire after political responsibilities has its source at the roots of the British connection with India. It has sprung inevitably from the deeper and wider studies of human thought and history, which that connection has opened to the Indian people. Without it the work of the British in India would have been incomplete. It was, therefore, with a wise judgment that the beginnings of representative institutions were laid many years ago. This scope has been extended stage by stage until there now lies before us a definite step on the road to responsible government.

5. With the same sympathy and with redoubled interest, I shall watch the progress along this road. The path will not be easy and in marching towards the goal there will be need of perseverance and of mutual forbearance between all sections and races of My people in India. I am confident that those high qualities will be forthcoming. I rely on the new popular assemblies to interpret wisely the wishes of those whom they represent, and not to forget the interests of the masses who cannot yet be admitted to the franchise. I rely on the leaders of the people, the Ministers of the future, to face responsibility and endure to sacrifice much for the common interest of the State, remembering that true patriotism transcends party and communal boundaries; and while retaining the confidence of the legislatures, to co-operate with My officers for the common good in sinking unessential differences and in maintaining the essential standard of a just and generous government. Equally do I rely on My officers to respect their new colleagues and to work with them in harmony and kindness; to assist the people and their representatives in an orderly advance towards free institutions, and to find in these new tasks a fresh opportunity to fulfil, as in the past, their highest purpose of faithful service to My people.

6 It is my earnest desire at this time that so far as possible any trace of bitterness between My people and those who are responsible for My government should be obliterated. Let those who in their eagerness for political progress have broken the law in the past respect it in future. Let it become possible for those who are charged with the maintenance of peaceful and orderly government to forget extravagances they have had to curb. A new era is opening. Let it begin with a common determination among My people and My officers to work together for a common purpose. I therefore direct my Viceroy to exercise in My name and on My behalf My clemency to political offenders in the fullest measure which in his judgment is compatible with public

safety. I desire him to extend it on this condition to persons who for offences against the State or under any special or emergency legislation are suffering from imprisonment or restrictions upon their liberty. I trust that this leniency will be justified by the future conduct of those whom it benefits and that all My subjects will so demean themselves as to render it unnecessary to enforce the laws for such offences hereafter.

7. Simultaneously, with the new constitution in British India, I have gladly assented to the establishment of a Chamber of Princes. I trust that its counsels may be fruitful of lasting good to the Princes and States themselves, may advance the interests which are common to their territories and to British India, and may be to the advantage of the Empire as a whole. I take the occasion again to assure the Princes of India of My determination ever to maintain unimpaired their privileges, rights, and dignities.

8. It is My intention to send My dear son, the Prince of Wales, to India by next winter to inaugurate on My behalf the new Chamber of Princes and the new constitution in British India. May he find mutual good-will and confidence prevailing among those on whom will rest the future service of the country, so that success may crown their labours and progress and enlightenment attend their administration. And, with all My People I pray to Almighty God that by His wisdom and under His guidance India may be led to greater prosperity and contentment, and may grow to the fulness of political freedom.—
DECEMBER the 23rd, 1919.

53. **Preamble to the Act of 1919:** The preamble of the Government of India Act, 1919, is in these terms :

“Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian Administration, and for the gradual development of Self-Governing institutions, with a view to the progressive realisation of responsible government in British India as an integral part of the empire :

And whereas progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken :

And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples :

And whereas the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility :

And whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces

in provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities :

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows :

54. Interpretation of the Preamble: According to Maxwell, preamble is an important part of the Act for finding out connotations of the sections. The Bombay High Court (22 Bom. 321 F. B.) lays down that when the words are clear, one cannot look to the preamble for interpretation. The Allahabad High Court (11 All. 262) and the Calcutta High Court (14 Cal. 176) agree with the view of the Bombay High Court. Recently (on 31-8-1932), the Bombay High Court discussed the said question in *Official Assignee vs Chinniram Motiram*. See, also, *Emperor vs. Ismail*, 35 Bom. L. R. 886 (F.B.).

The various phrases used in the preamble invite particular attention in view of the events that have subsequently happened. Those phrases are "declared policy", "increasing association of Indians", "gradual development of self-governing institutions", "progressive realisation of Responsible Government" and "as an integral part of the Empire".

We do not, at present, propose to discuss various implications arising out of the Preamble. We will discuss the same at the various relevant places while discussing the Act

We may generally state that an important question may arise whether a certain Act of an Indian legislature or whether a certain Ordinance which has a force of law is *ultra vires* of any of the Royal Proclamations. (It may be contended on behalf of the Crown that the Proclamations may be construed as general preambles.)

The Interpretation Act, 1889 (52 & 53 Vict. ch. 63), is also important while construing and interpreting the preamble. "The general rule to be, that the general words in the enacting part of the statute were not to be restrained by the recital." (*Drummond vs. Drummond*, 2 Ch. 44; *Copeman vs. Gallant*, 1 P. Will. 314-320; *King vs. Athos*, 8 Mad. 144; *Veer Raghav vs. The Secretary of State*, 49 Mad. 237-242; *Damodar vs. Deoram*, 1 Bom. 367. P. C.; *The Secretary of State vs. Moment*, 40 L. A. 48; *Hamabai vs. The Secretary of State*, 39 Bom. 279. P. C.; 40 Cal. 391-399 P. C.; *Bhagchand vs. The Secretary of State*, 29 Bom. L. R. 1227. P. C.; *In Re: Annie Besant* 49 Mad 1045. F. B.; 45 Bom. 196; 47 All. 338. See, also, *Emperor vs. Ismail*, 35 Bom. L. R. 886 (F. B.).

As by the Royal Proclamation of 1858, the Indian subjects were called upon to bear allegiance to the Crown on certain promises therein given, the

question may arise whether any Act passed or any Ordinance promulgated violates the said promises and thereby the allegiance is affected or not; and if the allegiance is affected the question may arise whether such an Act is *ultra vires* of the said Proclamation.

It should not here be discussed that the Royal Proclamation has the same value as an Imperial Act of Parliament.

55. Whether the preamble prevents the grant of Full Dominion Status : In the opinion of Sir Chimanlal Setalvad, the preamble does not prevent grant of even full Dominion Status. No doubt, in his opinion, the preamble as well as other provisions of the Government of India Act, being part of the statute, cannot be altered or modified except by Parliament. If, therefore, Parliament desires to amend the statute in such a way as to grant full Dominion Status, there is nothing in the way. The preamble as it stands does not prevent the Imperial Parliament to so amend the Act that full Dominion Status may be granted.

56. The New Period : Indian Statutory Commission : As provided for in section 84A of the Government of India Act, the Indian Statutory Commission was appointed for the purpose of inquiring into the working of the system of Government, the growth of education, and the development of representative institutions and matters connected therewith and to report the extent of desirability of establishing the principle of responsible government, or extending, modifying or restricting the degree of responsible government then existing therein including the question of desirability of establishing *second chambers in the local legislatures*.

We shall discuss the various questions that arose with reference to the interpretation of the section and the selection of the Personnel in Chapter VII thereof on Statutory Commission. We shall discuss the report and recommendations of the Commission on various points while dealing with the Government of India Act.

57. Assembly's Vote on the recommendations of the Statutory Commission : At its July (1930) Sessions, the Legislative Assembly, by an overwhelming majority, expressed an opinion that the recommendations of the Statutory Commission were inadequate and unacceptable. The debate arose out of the demand of the Government for a supplemental grant for defraying the expenses of the Round Table Conference. When this grant was asked for by the Government, one of the Honourable Members, Mr. Miya Shah Navaz, moved a *cut* to raise the debate on the recommendations of the Statutory Commission. The said *cut* was passed and the recommendations were declared to be inadequate and unacceptable by the Assembly.

58. Round Table Conference : Practically all schools of political thought in India disagreed with the interpretation of the said section, the selection of Personnel and the procedure laid down in connection therewith. When those

events took place, the Conservative Government was in power in England. The general elections in 1929 defeated the Conservative Government and the Labour Party was returned to Parliament with a majority though it was not a clear majority against the combination of the two opposing parties, viz., Conservatives and Liberals. Mr. Baldwin, the then Premier and leader of the Conservative party, tendered resignation and advised the King to invite Mr. Macdonald to accept the responsibility of forming the Ministry. The Labour Government thus came in power and they desired to allay the Indian feelings which were then very acute. In consultation with some leaders in India and in England the Labour Government found the *via media* of inviting some Indian Leaders and Indian Ruling Princes or their ministers to meet the representatives of the British Government at a Round Table Conference to be held in London after the publication of the report of the Statutory Commission.

59. Announcements in connection therewith: Lord Irwin, the then Viceroy, felt the pulse of the Indian feelings and therefore he decided to go *Home* with a view to acquaint the 'Home' Government and leaders of other parties with the political situation in India. According to his announcement, it was presumed that he really acted as an Indian Ambassador and persuaded the various parties and the 'Home' Government to accept the *via media* of the Round Table Conference for the solution of the delicate situation in India. The terms of the announcement to be made by him on behalf of the Imperial Government were settled in London; and he made the necessary announcement in India on October 31st, 1929. The important portion of his announcement was worded in the following terms :

60. The Announcement of 31st October 1929: "I have just returned from England, where I have had the opportunity of prolonged consultation with His Majesty's Government. Before I left this country, I said publicly that as the Government's representative in India, I should hold myself bound to tell my fellow countrymen as faithfully as I might of India's feelings, anxieties and aspirations..... I have never felt any doubt that opinion in Great Britain, puzzled as it might be by events in India or only perhaps I was informed as to their true significance in determination that Great Britain should redeem all the full pledges she has given for India's future..... It is unprofitable to deny the right of Parliament to form its free and deliberate judgment on the problem as it would be short-sighted of Parliament to underrate the importance of trying to reach a solution which might carry the willing assent of political India.....".

61. Suggestion of the Round Table Conference: Continuing Lord Irwin said: "He (Sir John Simon) suggests that what might be required after the reports of the Statutory Commission and the Indian Central Committee have been made, considered and published but before the stage is reached to the

Joint Parliamentary Committee, would be the setting up of a Conference in which *His Majesty's Government should meet* Representatives of British India and of the States for the purpose of seeking the greatest possible measure of agreement for the final proposals which it would, later, be the duty of His Majesty's Government to submit to Parliament..."

62. Dominion Status, the definite goal: Proceeding further, Lord Irwin said: "the goal of British policy was stated in the declaration of August 1917 to be that of providing for the gradual development of self-governing institutions with a view to the progressive realisation of Responsible Government in India as an integral part of the British Empire. As I recently pointed out, my own Instrument of Instructions from the King-Emperor expressly states that it is His Majesty's wish and pleasure that plans laid down by Parliament in 1919 should be the measures by which British India may attain its due place amongst Dominions; but in view of the doubts which have been expressed both in Great Britain and India regarding the interpretation to be placed on the intentions of the British Government in enacting the Statute of 1919. *I am authorised on behalf of His Majesty's Government to state clearly that in their judgment, it is implicit in the declaration of 1917 that the natural issue of India's Constitutional progress as there contemplated is the attainment of Dominion Status.....*"

63. Terms of Round Table Conference: And proceeding further, Lord Irwin made the necessary announcement for the Round Table Conference in the following words; "when therefore, the Commission and the Indian Central Committee have submitted their reports and these have been published and when His Majesty's Government have been able in consultation with the Government of India to consider these matters *in the light of all the material then available they will propose to invite representatives of the Indian States to meet them separately or together as the circumstances may demand for the purpose of conference and discussion in regard both of the British India and the All-India problems.*"

References were made to this announcement in the House of Commons. Mr. Wedgwood Benn, the then Secretary of State for India, made, also, an important speech on the various constitutional issues involved. His speech is important from various constitutional view-points.

We will discuss the various constitutional issues raised therein at their proper places while dealing with the Act.

Lord Irwin, thereafter, invited the various Indian leaders to meet him for the purpose of considering the various announcements made. The leaders representing the Indian National Congress which was then accepted to be the largest political organization in the country having the greatest following, demanded of the Viceroy to make it clear that the Conference to be held

in London should be for the purpose of devising a constitution on the basis of Dominion Status and that the Imperial Government will submit the bill embodying such a constitution to Parliament. The Viceroy is reported to have expressed his inability to meet with the demand and it is further reported that he only expressed his ability to give an undertaking that the Conference would be free and unfettered. Under these circumstances, the Indian National Congress decided not to have anything to do with the proposed Round Table Conference. In June 1930, the leaders representing the Indian National Congress, in substance, expressed their willingness to join the Round Table Conference, if their original proposals were accepted. In the month of June, the recommendations and the report of the Statutory Commission were published and no school of political thought in India accepted the said recommendations; on the contrary, almost every one opined that the recommendations were reactionery and retrograde. We shall however discuss the recommendations from the constitutional view-point at its proper place, on each point, while discussing the Government of India Act.

Thereafter on July 9th, the Viceroy with the authority of the 'Home' Government made the announcement with reference to the Round Table Conference on the floor of the Indian Legislature in the following terms:

"After very careful consideration, His Majesty's Government have reached the conclusion that it will not be right to prescribe for the Conference any terms more limited than are modified in my statement of November 1st last and that the Conference should enjoy full freedom that those words connote.

"The Conference accordingly will be free to approach its task greatly assisted, indeed, but with the liberty unimpaired by the Report of the Simon Commission or by any other document which will be brought before it.

"It is a belief of His Majesty's Government that by way of the Conference it should be possible to reach solution which both the Countries and *all parties and interests in them* can honourably accept and any such agreement on which the Conference is able to arrive will form the basis of the proposals which His Majesty's Government concede to.

"The Conference will not be held as a mere meeting for discussion and debate but as a joint Assembly of *Representatives of both the Countries on whose agreement* the precise proposals to Parliament might be founded.

"I see no reason why from a frank discussion on all sides a Scheme might not emerge for submission to Parliament, which would confound the pessimism of those who would tell us that it is impossible for Great Britain and India or for various interests in India to reach an agreement."

64. Difference between the October 1929 and July 1930 Announcements: If the terms of both the Announcements are properly examined, one

will find material change in the terms of the said two announcements. According to the October Announcement, it was proposed that the *British Government* would meet all the *representatives and interests in India* and the *representatives* of the Indian States after the recommendations of the Settutory Commission were published. According to the July Announcement, it was announced that *parties and interests in England* would meet all the representatives of Indian political thought and interests and the representatives of the Native States. The changes, it will be noted, are very material.

On July 29th, 1930, the Premier announced in the House of Commons that the members of the Opposition will be represented at the London Conference.

65. General consideration: The British Cabinet is really speaking the representative of the British Nation so far as the conduct of the government is concerned. The cabinet has to shoulder the responsibility in all cases of the conduct of the government; and so far as one can see, it is never heard of the members of the Opposition being represented along with the Government at such Conferences. However, as the Labour Government had not clear majority in the House of Commons, the Opposition must have been invited to share the responsibility by electing their representatives.

Important Statements were made by the Premier in the House of Commons and by Lord Russel in the House of Lords on July 29th, 1930. One of the important statements was that the representatives of the Opposition will be represented. But, the statement of a very far-reaching importance was made to the effect that the Government would retain complete freedom with regard to the proposals to be laid before Parliament as the outcome of the Conference. Lord Russel on behalf of the Government in the House of Lords, amplified the said statement by stating that he was not aware that the Conference would bind Parliament any more than Parliament was bound by the Simon Commission. It would be for Parliament to decide what was to be done after the Conference. Lord Russel did not consider the size of the British Delegation very important as matters could not be decided by a counting of votes. Legally, this statement shows that all those who attended the Conference (of course excepting the British Government) were merely witnesses and debaters and no amount of words giving contrary assurances could change the position of the delegates from that of witnesses. Witnesses and Counsel have the right only to submit the case, there being no ultimate responsibility with them. And obviously, that is the position of the delegates because nothing shall bind the British Government who shall retain the absolute freedom and responsibility of submitting their own proposals to Parliament. However, constitutionally, the position would be different. If the Government and the Opposition agreed, there would be no difficulty in putting those agreements on the Statute Book.

66. First India Round Table Conference: Pursuant to the said Announcement, the first India Round Table Conference met in November, 1930. Practically, it ended on 19th January, 1931. Various plenary Sessions of the said Conference were held whereat general discussion took place. Thereafter various sub-committees were appointed to consider particular subjects and they were asked to submit their reports. Those sub-committees were: (1) Federal Structure Sub-Committee, (2) Provincial Constitution Sub-Committee, (3) Minority Sub-Committee, (4) Burma Separation Sub-Committee, (5) North Western Frontier Province Sub Committees; (6) Franchise Sub-Committee; (7) Defence Sub-Committee; (8) Services Sub-Committee, and (9) Sindh Separation Sub-Committee. Regarding the separation of Burma, the whole conference was converted into a Committee and in the said committee the separation of Burma was discussed on the 1st December, 1930.

At the Plenary meetings held on the 12th, 17th, 18th, 19th, 20th, and 21st November, 1930, general discussion took place.

The various sub-committees hereinabove referred to, met and submitted their reports to the Conference.

The various plenary meetings were held for considering reports of various sub-committees and for generally reviewing the work of the Conference. For these purposes, plenary Sessions were held on the 16th and the 19th January, 1931. At the said meetings, winding up the Conference, the Premier made a statement on behalf of his Majesty's Government. The important portions of his said statement are as follows:

67. "The view of his Majesty's Government is that the responsibility in the Government of India should be placed upon the legislatures, Central and Provincial, with such provisions as may be necessary guaranteeing, during the period of transition, the observance of certain obligations and to meet other special circumstances and also with such guarantees as are required by minorities to protect their politics, liberties and rights."

2.	x	x	x	x	x
3.	x	x	x	x	x

His Majesty's Government have taken note of the fact that the deliberations of the Conference have proceeded on the basis acceptable by all the parties that the Central Government should be a Federation of all India. x x x

With a legislature constituted on the Federal basis His Majesty's Government will be prepared to recognise the principle of the responsibility of the executive to the legislature.

Under the existing conditions the subject of defence and external affairs will be reserved. x x x x

x x x x

Governor-General himself as a last resort be able in an emergency to maintain the tranquility of the state and must similarly be responsible for the observance of the constitutional rights of minorities, he must be granted the necessary power for these purposes.

As regards finance, the transfer	x	x	x	x
must necessarily be subject to such conditions		x	x	x

This will mean that under the existing conditions the central legislature and the executive will have some features of dualism which will have to be fitted into the constitutional structure.

The provision of reserved powers is necessary x x x
x x x x It is, for instance, undesirable that
ministers should trust to the special powers of the Governor-General as a
means of avoiding responsibility which is properly their own.

The Governor's Provinces will be constituted on a basis of full responsibility. These ministers will be taken from the legislature and will be jointly responsible to it. The range of provincial subjects will be so defined as to give them greatest possible measure of self-government. The authority of the Federal Government will be limited to provisions required to secure its administration of federal subjects and so discharge its responsibility for subjects defined in the constitution as of all-India concern.

There will be reserved to the Governor only that minimum of special powers which is required in order to secure in any exceptional circumstance, the preservation of tranquility to guarantee the maintenance of rights provided by statutes for the public services and minorities.

x	x	x	x	x	
x	x	x	x	x	x
x	x	x	x	x	
x	x	x	x	x	
x	x	x			

Personal contact is the best way of removing those unfortunate differences and misunderstandings.

68. Sub-Committees' Reports: We do not propose to discuss the reports of all Sub-Committees as they have no binding character.

69. **Events of 1931:** With a view to avoid politics, we do not desire to refer to the state of feelings between the Government and the Congress. Suffice it to say that the Congress did not consider the statement regarding the first Round Table Conference to be adequate and therefore the Congress

declared non-co-operation with the Government. Unhappy feelings existed during the period beginning from March 1930 to January 1931.

After the work of the first Round Table Conference was over, steps were taken to bring about friendship between the Indian National Congress and the Government.

Lord Irwin, the then Viceroy, conferred with Mr. M. K. Gandhi the accredited leader of the Congress and arrived at a certain agreement which is generally known as the Gandhi-Irwin Pact. Pursuant to the said agreement, *inter alia*, the truce was declared and the political prisoners were released.

Many difficulties were overcome by mutual agreement and toleration, and the co-operation of the Congress was made certain.

70. The second Round Table Conference, as announced at the end of the first Round Table Conference, was held in London. The Federal Structure Sub-Committee first started deliberations before the plenary Conference was held. Mr. Gandhi and others were appointed members of the various Sub-Committees including the said Federal Structure Sub-Committee.

No final conclusion was arrived at at the conclusion of the second Round Table Conference. It may be incidentally noted here that there was a change in the Government in England between the first Round Table Conference and the second Round Table Conference.

In September, 1931, the National Government was formed in England.

The Cabinet was a curious combination. It was mainly composed of the Tories; and Sir Samuel Hoare was assigned the office of the Secretary of State for India.

Practically, no conclusions were reached and no agreements were arrived at at the said Conference.

71. The second Statement of the Premier : On December 1st, 1931 the Plenary session met. Mr. Macdonald the Premier made a statement on behalf of His Majesty's Government. The important features of the said Announcement are: (1) the Government re-affirm the policy laid down in the Premier's Declaration of January 19th; (2) the Government will take immediate steps for getting the said statement ratified by the House of Commons; (3) His Majesty's Government will arbitrate on the Communal question if the parties will not arrive at a mutual agreement; (4) the Government will give statutory guarantee of their rights to minorities; (5) the Standing Committee in the nature of a consultative and various other Sub-Committees will be appointed; (6) a third Round Table Conference will

be held for renewing the work of the several Sub-Committees, and (7) the North-Western Frontier Province will be converted into a Governor's Province. (This has been carried into effect).

The Sub-Committees were accordingly appointed (1) to examine Federal Finance, (2) to formulate proposals regarding Franchise and (3) to examine the treaty rights of the Indian Princes.

The Conference was then brought to an end with a hope to meet at the third Conference.

72. Instead of the third Round Table Conference: On 27th June, 1932, Sir Samuel Hoare, the Secretary of State for India, made a statement in the House of Commons regarding the procedure to be adopted for settling the new constitution for India. He declared that the third Indian Round Table Conference will not be held, contending that it was a cumbrous procedure and thereby the matter was unnecessarily delayed.

The Government shall prepare a Bill formulating its proposals for the revision of the constitution. But thereafter, they will not follow the usual Parliamentary procedure. Instead, the Government will invite Parliament to set up a Joint Select Committee of both Houses to consider the said proposals and the Government will give further powers to the Committee to confer with the representatives of Indian opinion. Such representatives will have the status of English assessors.

The Proposals will be contained in one single Bill containing the provisions: (1) for autonomous constitution in the Provinces and Federation of Provinces and States and (2) for introducing Provincial Autonomy without unnecessarily waiting for the inauguration of the Federation.

The Secretary of State declared that there shall neither be a formal session of the Round Table Conference nor of the Federal Structure Sub-Committee.

When an objection was taken to the abandonment of the Round Table Conference, Sir Samuel Hoare explained his new procedure by stating: "Moreover at the Joint Select Committee Indians will have a great advantage they never would have at the Round Table Conference, (namely) of seeing the specific proposals of the Government.

"Specific proposals of the Government will be put before the representatives of India, and discussion of that kind will be far more profitable than unnecessarily delaying by discussion of a large body like the Round Table Conference."

He also declared that Parliament will be the supreme authority. If his statement is properly analysed it means that the new Act would not confer the same rights which are conferred upon Dominions.

Instead of a Bill, the Government have issued the 'White Paper' and have set up a Joint Parliamentary Committee to examine the Proposals contained therein.

73. Change of Principle?: When the Indian Statutory Commission was appointed in 1927, India objected to it on the ground that Indians were not prepared to appear as mere witnesses and petitioners before any Commission appointed in that way. The crux of the contention was that India was prepared to co-operate, if Indians were invited to do so on the footing of equality. Seeing great force in their contention, the principle of Round Table Conference was evolved by the then Government. The principle underlying the Round Table Conference was that Indian and English representatives were to meet and discuss the various problems on the footing of equality and the agreed conclusions were to be made the basis of the Government of India Bill. India co-operated with England on that basis at the two Indian Round Table Conferences.

Whatever may be said by the Secretary of State, the fact remains that on the basis of constitutional principles, the proposed Joint Select Committee will be the body who cannot enter into any agreement with Indians. Whoever may appear before such Committee will be a witness—or may be better than a witness—but in no event he will be the colleague of the Committee, and consequently, his opinion cannot have any binding effect on the Committee. As it is said, he will be in the position of an English assessor.

The Premier made it clear in his statement of 1st December, 1931, that the Third Conference will be held. By Sir Samuel Hoare's statement the Premier's said statement seems to have been negatived.

74. Constitutional Position: We will now discuss the constitutional position. In Parliament, there are various responsible parties. Representatives of these parties were appointed on the Round Table Conference. Indian representatives were called upon to meet such British representatives. It was made clear that the agreement arrived at between such representatives shall form the basis of the future Government of India Bill. If the representatives agree, Parliament naturally would agree and therefore indirectly the Parliament would be bound to give a legal and statutory effect to the said agreement.

The Joint Select Committee which is now appointed will not be bound by any opinion of the Indian representatives. Further, members of the Joint Select Committee are not empowered to make any agreement with the Indian representatives who may appear before them to give evidence, or who may be invited to confer with the Committee. That being so, there shall be no agreed conclusions between the British and the Indian representatives and therefore Parliament will not have the benefit of having any agreed conclusions before them.

It can, therefore, be contended that Sir Samuel Hoare's statement lays down a substantial change in principle.

75. White Paper As foreshadowed at the end of the third Round Table Conference, His Majesty's Government issued a White Paper in March 1933 embodying therein the Government's proposals for the future constitutional reforms in India. The said proposals will be considered at their proper places. Suffice it to observe at this stage, that many political and communal parties in the country, have expressed their opinion that the proposals fell much short of their expectations. By a majority, the Patna Legislative Council passed a resolution, in July 1933, to the effect that the proposals were such that they were not acceptable.

76. Joint Parliamentary Committee: Pursuant to what transpired at the third Round Table Conference, it was pretty certain that Parliament would set up a Joint Committee from amongst themselves to consider the proposals of the Government laid down in the White Paper. Sir Samuel Hoare, the Secretary of State for India, accordingly brought a motion before the House of Commons on March 27th, 1933, the text of the resolution being: 'that before Parliament is asked to take a decision on the proposals contained in the White Paper, it is expedient that a Joint Select Committee of the House of Lords and the House of Commons, with power to call into consultation representatives of the Indian States and of British India, be appointed to consider the future government of India, and, in particular to examine and report upon the proposals contained in the White Paper.' A debate followed on this motion. After a storm in a tea cup, the said motion was passed with an over-whelming majority. A similar motion was also moved in the House of Lords by Lord Sankey. A debate thereon followed for three days, but ultimately the same was adopted without a division.

77. Indian "Assessors": The words "with power to call into consultation representatives of Indian States and of British India" in the text of the motion adopted by both the Houses of Parliament are worth noting. The first question that is suggested to one is what would be the position of the said Indian representatives who would be called for consultation? It was evident that in view of what was stated on behalf of His Majesty's Government and the way in which the text of the said motion was worded, the status of the said Indian representatives would not be one of equality. It was, however, subsequently made clear that the status of the said representatives was to be that of English Assessors.

A Joint Parliamentary Committee was, then, appointed composed of several members from the House of Commons and some representing the House of Lords.

The said Joint Parliamentary Committee started taking evidence and con-

sidering the said proposals. That work is over. They will present their report to Parliament in due course of time.

78. Self-Government : It must have been noted, para one of the Preamble to the Act of 1919 mentions Responsible Government in British India.

79. The Characteristic of a responsible government is the executive which is responsible to the popularly elected legislature which in its turn is responsible to a popular electorate.

80. Sir Malcolm Hailey : When Mr. Rangacharier, in 1924, moved a resolution in the Legislative Assembly, seeking to secure to India full self-governing Dominion Status, Sir Malcolm Hailey, the then Home-Member and Leader of the House opposing the said motion addressed as follows: "If you analyse the term 'full Dominion Self-Government', you will see that it is to some extent conveying that not only will the executive be responsible to the Legislature, but the Legislature will in itself have the full powers, which are typical of the modern Dominion. I say there is some difference of substance because Responsible Government is not necessarily incompatible with a Legislature with limited or restricted powers. It may be that full Dominion Self-Government is the logical outcome of Responsible Government; nay, it may be the inevitable and historical development of Responsible Government; but it is a further and final step." The members of the Legislative Assembly and the Indian public repudiated the implications of the argument. They found it hard to believe that responsible British Statesmen, in 1917 and 1919, could make statements of this importance with mental reservations.

81. Sir Malcolm's argument should, however, be considered strictly from the legal and constitutional point of view. In the Dominions, where the powers of the Legislature are exceedingly wide, there are a few matters, merchant shipping for instance, in which they are subject to restrictions imposed in the interests of the Imperial Government. This shows that there may be a ministry responsible to the legislature and yet there may not be full Dominion self government. The Dominion statesmen, however, contended that responsibility carries with it full self-government. It will not be out of place here to quote General Smuts. His statement is summarised thus: "He claimed that the Imperial Parliament had no longer the right to legislate for the (South African) Union except possibly on the express request of the Union, in order to extend its powers which are still limited by the South African Act; he asserted that the right of disallowance of the Union Acts by Imperial Government had disappeared; he asserted also that the Governor-General must be assimilated in powers and position of the Crown in the United Kingdom and must cease to represent in any sense the Imperial Government; and he maintained the right of the Union to appoint and receive diplomatic agents if it desired." In view of this position of the dominion constitution there cannot be a limited meaning of self-government and Sir

Malcolm's interpretation cannot be upheld. Some time back, Gen. Hertzog expressed the view that the dominion has the right to secede from England. (We have already referred to the opinion expressed by Sir Chimanlal Setalvad on the interpretation of the preamble.)

82. Dominion Status: We have used the term 'Dominion Status' and we shall have to deal with the same in the following chapters. It is, therefore, necessary to define Dominion Status. Before 1926, there was no clear and concise definition of the term, but after the Imperial Conference of 1926, it was made perfectly clear and it is now a well understood phrase in constitutional law. At the meeting of the said Conference, i.e., the Imperial Conference of 1926, the position of the group of self-governing communities composed of Great Britain and Dominions was defined as follows: "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any respect of the domestic or external affairs, though united by common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." While criticising this definition, Prof. Keith says 'that the definition may be admitted for its intention rather than for its accuracy, as a description of fact as opposed to ideal.' He even includes India amongst Dominions on the ground that the position of the latter (i.e., India) being motivated by the fact that she has been assured in due course self-government on the dominion model.

'Dominion Status in action': While speaking in the House of Commons on December 18th, 1929, Mr. Wedgwood Benn speaking on the position of India expressed that there was 'Dominion Status' *in action* in India. Mr. Benn is reported to have said as follows: "My Hon. friend and I are in agreement .. on two things at least; First of all to one definite, ascertained and advertised goal, i.e., the difficult task of the Government is not merely a harsh and barren negative.....the 2nd point.....when constitutional changes of the greatest magnitude are being considered, it is essential that public order should be maintained.....but I recognise..... that the real basis of order is not police. The real basis of order is public goodwill- It is not uniformed constable who keeps the order but every citizen..... ; and the Government is maintained on the basis of co-operation and goodwill of the people...the goal of British policy in India has been declared to be the achievement of Dominion Status...and must trace briefly in outline the history of some Indian events, in the course of the last ten years. In 1919, plenipotentiaries on behalf of India signed the treaty of Versailles and India became a separate entity and original member of the League of Nations." Thereafter Mr. Benn, in his said speech, referred to the (alleged) relaxation of control by the Secretary of State, over tariff autonomy, store purchasing, abandoned idea of exploitation of India and such other subjects and said: "now let usshow Dominion Status in action. India...has an Indian

acting as High Commissioner...India...sent out to south Africa, to negotiate in regard to Indians in South Africa, one of the most distinguished members of their Government, Sir Mahomed Habibulla. India has played a large part in international labour matters; has a seat on the governing body of the international labour office." Thereafter he referred to separate representation of India at the five Naval-Power-Conference in London and said: "just as in the history of every dominion, it has not been a matter of legislative change but of use, custom, want and tradition which have built up these powers; the same procedure is proceeding rapidly in the case of India to-day.. We have tried to prove the sincerity of our pledge when we said 'we desired to see India reach 'Dominion Status' ''.

Mr. Amery, ex-Colonial Secretary, presiding over a meeting on December 5th, 1929, said: "India has enjoyed Dominion Status during the past decade both as a member of the Imperial Conference and of the League of Nations. What India does not possess is full responsible government—a very different matter."

These responsible expressions of opinion lead us to learn that it is alleged that India has Dominion Status in external affairs but not in internal affairs.

Negation : Mr. Wedgwood Benn's speech and other responsible utterances in England have negatived the unwarranted and unjustifiable interpretation of self-government by Sir Malcolm Hailey.

The subsequent events that happened in India have, however, negatived the various expressions and utterances of Mr. Wedgwood Benn and others.

83. Lord Willingdon and Dominion Status for India: In September 1935, Lord Willingdon the present Viceroy of India, while addressing the Indian Legislature, *inter alia*, said: "it was the Government's policy to rush with the reforms as hard as they could go so as to help India forward into Dominion Status and absolute equality with the other Dominions." This statement is nothing else but a repetition of what Lord Irwin, Lord Willingdon's predecessor in office, said regarding the future reforms for India.

There was great agitation, in England, on this statement. As explained above under the para, "Dominion Status in action" the political opponents of the present British Cabinet expressed that India was given a Dominion Status during the World-War of 1914. They further explained that even that status cannot be compared with the status enjoyed by other Dominions. It may, however, be again noted that during the war and after, whenever any conference took place the said self governing Dominions elected their own representatives, whereas the Indian delegates were the chosen nominees of the Government and not the *elected representatives* of the Indian Nation.

84. The Statute of Westminster of 1931 and Dominions: Till now there was no legal sanction given to the various resolutions of the Imperial Conferences held in 1926 and 1930. With a view to give legal sanction to the said resolutions, the Statute of Westminster of 1931 (22 Geo. V, ch. 4) was passed.

As there are many implications in the preamble of the said Act we propose to reproduce the same here:

"Whereas the delegates of His Majesty's Government in the United Kingdom, the Dominions of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and New Foundland, at Imperial Conferences held at Westminster in the years of 1926 and 1930 did concur in making the declarations and resolutions set forth in the reports of the said Conferences :

" And whereas it is neat and proper to set out by way of preamble to this Act that, inasmuch as the Crown is a symbol of a free association of the members of the British Commonwealth of Nations, and as they are united by common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the Law, touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliament of all the Dominions as of the Parliament of the United Kingdom :

" And whereas it is in accord with the established constitutional position that no law hereinafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion :

" And whereas it is necessary for the ratifying, confirming and establishing of certain of the said Declarations and Resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom :

" And whereas the Dominions x x x x
 x x x x requested and consented to the
 submission of the measure to the Parliament of the United Kingdom for
 making such x x x x x x"

Provisions: The Act does not define "Dominion" but enumerates those Dominions which are mentioned in the preamble. By sections 2 & 4, it is provided that any Act of Parliament shall not thenceforth be applicable to any Dominion unless the Parliament of any Dominion concerned so decided. By section 3, the Parliament of a Dominion has been given Extra-Territorial Jurisdiction.

In short, Dominions are made almost independent of the British Parliament.

85. Right to Secede: On the due interpretation of the statute of Westminster, Ireland, South Africa and such other Dominions contend that they have been given a right to secede from the British Commonwealth. In support of their contention they rely upon the speech made by Mr. Bonar Law, the then Prime Minister, which he made in 1920, when the Government of Ireland Bill was on the anvil. He contended that if India were granted a dominion status she would certainly have a right to secede from the British Commonwealth. In 1926, this question was pertinently brought into discussion and no British Minister was in a position to assert that Dominion Status did not carry with it the right of secession.

Prof. Keith refers to the preamble of the Statute of Westminster and contends that the right of secession is not thereby granted. But he is faced with the contention pertinently raised by General Hertzog in 1926 at the Imperial Conference which was neither repudiated nor contradicted by any British Minister. Prof. Keith himself now feels that so far as the Dominions covered by the said Statute of Westminster are concerned, the right of secession may not be successfully disputed. The learned Professor, however, warns the British Government from committing a similar blunder in connection with India.

CHAPTER II

HOME GOVERNMENT

Sec. 86. "Home Government" is a part of the government which consists of the highest *executive* in England under whose control, guidance and supervision the Government of India (consisting of the Central and the Local Governments in India) exercise their respective powers and functions. Such highest *executive* authorities in England (i.e., the *Home Government*) are: (1) "the Crown", (2) "the Secretary of State" and (3) "the Council of India."

J. S. Mill expressed the opinion that "the principal function of the "Home Government" is not to direct the *details* of administration but to scrutinise and revise the past acts of the Indian Government, to lay down principles and issue general instructions for their future guidance, and to give or refuse sanction to grant political measures which are referred Home for approval." According to him, the executive Government of India must be seated in India itself.

1 87. The Crown technically means the King-Emperor reigning for the time being. The constitutional significance of the title of the

Crown is discussed in the second part of this treatise. In this part, we are concerned only with the legal position of the Crown as laid down in the Government of India Act. Sec. 1

The territories for the time being vested in His Majesty the King-Emperor in India are governed by and in the name of His Majesty the King-Emperor of India. By statute, very independent and extensive powers are vested in the Crown regarding the Government of India. Such powers are called statutory powers which could be enumerated under two heads: (A) Executive, and (B) Legislative,; Judicial & Ecclesiastical, as follows:

(A) Executive

(1) By Warrant under the Royal Sign Manual HIS MAJESTY can
 Appoint (a) the Governor-General of India and (b) the members of the Governor-General's Cabinet, (c) (i) the Governors of Bombay, Bengal and Madras and (ii) those of the five minor provinces of the U. P., the Punjab, Bihar and Orissa, the C. P. and Assam *after previous consultation* with the Governor-General of India, (d) Members of the Governor's Executive Councils and (e) Advocates General for Bombay, Bengal and Madras, (f) (by Warrant under the Royal Sign Manual *but with the counter-signature* of the Chancellor of the Exchequer,) an Auditor of Indian Accounts in England and (g) pensions and gratuities could be granted to any member on the establishment of the Secretary of State for India in Council; *similarly, *but with the counter signature* of the Secretary of State for India, pensions could be granted to Bishops out of the Revenues of India. 34
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(2) Subject to His Majesty's sanction, (i) a new province of a Governor can be constituted; (ii) a part of a Governor's province can be placed under the administration of a Deputy-Governor; (iii) a new province can be constituted under a Lieut.-Governor; (iv) a district can be transferred from one province to another; and (v) a new local Legislature can be created. 52A
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(2) Subject to His Majesty's approval, (i) the appointment of a Lieut.-Governor can be made and (ii) members of his executive council can be appointed; and (iii) such *approval* is necessary for names of persons to serve on the Statutory Commission as provided for by the Part VIA. 54
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84A

(4) During His Majesty's pleasure, (i) all persons, in the Civil Service of the Crown in India, hold Office; it has also been provided (ii) that nothing in this Act shall derogate from any rights vested in the Crown relating to the Government of India and (iii) that all treaties 96B
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Sec. 1 made by the East India Co. being in force at the commencement of this Act, shall be binding on the Crown.

3 (7) (5) The Crown may (i) remove any member of the Council of the Secretary of State for India on an address of both Houses of Parliament; (ii) fix the number of the Members of the Cabinet of the Governor-General and (iii) make such rules as to the leave of absence of the Bishops of Bombay, Bengal and Madras.

(B) Legislative, Judicial and Ecclesiastical

67, 72 (6) The *assent* of the Crown is *necessary*, for an Act passed with the powers of *certification*, of the Governor-General or those of a Governor, *before*, such Act can have effect.

113 (7) By *Letters Patent*, the Crown *may* if he sees fit, (i) establish an additional High Court of Judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court with such jurisdiction, power or authority as he **106** thinks fit, (ii) amend, from time to time, the Letters Patent and **118** (iii) appoint Bishops of Bombay, Bengal and Madras and determine each **115** one's jurisdiction and functions.

102 (8) The Crown *appoints* Chief Justices and other Judges of High **105** Courts who hold office during his pleasure.

(9) His Majesty may signify, through the Secretary of State for **109** India in Council, his disallowance of the Order of the Governor-General in Council altering or transferring the local limits of jurisdiction of any High Court.

99. The Crown and His Constitutional Powers : So far we have dealt with the *statutory powers* of the Crown; but the question remains who in practice exercises such powers. To determine this question, it is not necessary to go into details of the Constitutional Law of England in this part of the treatise; suffice it to say that His Majesty is a *Constitutional Monarch* and as such he always acts on the advice of his *responsible minister* who, in this case, is the Secretary of State for India.

100. The Position of the Crown as foreshadowed in the WHITE PAPER: The proposals in the White Paper will revolutionise the position of the Crown *vis a vis* the Government of India, a Federation of Indian States and the Provinces in British India. If that conception is fructified, the present Government of India Act will be repealed in

* These Sections have been repealed; but Similar provisions have been incorporated into the Indian Church Act, 1927 (17&18 Geo. V, ch. 40).

to and will be replaced by an absolutely new Act which is for the present described as the 'Constitution Act' in the said WHITE PAPER. (Para 5 of the White Paper). On repeal of the present Government of India Act, all powers appertaining and incidental to the Government of British India will vest in the Crown in whose name and as whose representatives the Governor-General and the Viceroy and other Provincial Governors will act in exercise of the necessary powers and functions under the Constitution Act.

Sec.
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It is proposed that by Letters Patent and Instrument of Instructions, the Crown will delegate various powers to Viceroy, Governor-General and various Provincial Governors. These points will be discussed while considering the position, powers and functions of Governor-General and Governors. It may, however, be mentioned that two distinct terms Governor-General and Viceroy are used. As proposed, one person shall be both a Governor-General and Viceroy but with different powers and functions as a Governor-General and as a Viceroy. These different powers and functions will also be discussed later.

It may be noted for the present that it is proposed to declare that the executive power and authority of the Federal Government will be vested in the Crown, and, the same in each of the Governor's Provinces will also be similarly vested in the Crown and will be exercised by the Governor as the King's representative. (Paras 9, 10 & 11 of the White Paper).

101. British India: We meet with the word 'British India' in the provisions of the Act; it means that part of India which is governed by and in name of the Crown through the constitutional machinery; whereas, *India* includes other parts of the country which are not under such regime. *India* in its wider sense includes territories of Native States, but *does not* include Portuguese and French Indian Territories.

102. British India and White Paper: The term British India shall have to be differently understood if the plan of Federation as conceived in the White Paper is carried out. The States—the Indian States—though they are under the suzerainty of the Emperor, are no part of his Majesty's Dominions. Their contact with British India has hitherto been maintained by the conduct of relations with their Rulers through the Governor-General in council. Moreover, since Parliament cannot legislate directly for their territories, the range of authority to be conferred upon the Federal Government and Legislature in relation to the States must be determined by agreement with the rulers. The position will, therefore, necessarily be that in the Indian Federation the range of powers to be exercised by the Federal Government and

Sec. 1 Legislature will differ in relation to the two classes of units which compose it. (Para 7, Introduction).

Para one of the Proposals requires to be carefully read as that proposal makes the position very clear. The general principle underlying all these proposals is that all powers appertaining or incidental to the Government of *India* and all rights, authority and jurisdiction possessed in that country—whether flowing from His Majesty's Sovereignty over the territories of British India, or derived from treaty, grant, usage, sufferance or otherwise in relation to *other territories*—are vested in the Crown and are exercisable by and in the name of the King-Emperor. (Para 1, Proposals).

2 **103 The Secretary of State:** It must be remembered that the King in England has his Cabinet. The members of such Cabinet are constitutional advisers of the King and they are responsible to Parliament in accordance with the constitutional practice for their official acts. The principle of the joint responsibility of the Cabinet is discussed in the second part of this treatise. One of the principal members of the Cabinet is entrusted with the portfolio of India; and this principal member is called the *Secretary of state for India*. Subject to the provisions of this Act, the Secretary of State for India has and exercises all such or the like powers over all officers appointed or continued under this Act; in particular, he may, subject to the provisions of this Act or rules framed thereunder, superintend, direct and control all acts and operations relating to the government or revenues of India.

104. Colonial Secretary and Secretary of State for India: The powers of these Secretaries—though both members of the Cabinet—are different. The Government of India not being responsible to the Indian Legislature, the Secretary of State for India has wider powers of superintendence, control, etc., on the ground that the Secretary of State for India is responsible for the administration in India to Parliament.

105. His Powers: The Secretary of State has certain statutory powers with reference to (A) the Government of India and (B) to his Council, technically, called the Council of India. Before enumerating his such powers, it may be noted that his powers with reference to his Council are somewhat *elastic, except in eight cases* which shall be considered while dealing with *sec. 9* of the Act, and he is not bound to follow the majority. He can disregard the majority, and follow his own opinion.

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2 **(1)** The Secretary of State may, subject to the provision of this Act, superintend, direct and control the entire administrative machinery in India as hereinbefore stated under *sec. 2*.

HOME GOVERNMENT

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(2) He is empowered with all the powers and authority relating to the Government of India and its revenues which were previously exercised by the East India Co., its Court of Directors and Proprietors. **Sec. 2**

(3) He is authorised to issue orders to the Governor-General in Council as he thinks fit and the Governor-General in council is bound to obey the same. **33**

(4) The Governor-General in Council is bound to inform the Secretary of State of any hostilities or treaties made by them. **44**

(5) He may, if he thinks fit, by order, revoke or suspend for such period as he may direct, the appointment of a Council for any or all of the Governors' provinces **46**

(6) Subject to his *approval*, the Governor-General in Council may take any part of British India under their immediate authority and management. **59**

(7) His *sanction* is required to be taken if the period between the dissolution of the Indian Legislative Assembly or the Council of State or a Governor's Legislative Council and its next Session is prolonged beyond six months. **63D 72B**

(8) He may appoint Indian Civil Servants from amongst persons domiciled in India, subject to the Rules and with the concurrence of a majority of votes at a meeting of his Council. **97**

(9) The Governor-General in Council are bound to transmit to him an authentic copy of their every order altering the local limits of jurisdiction of Indian High Courts. **109**

(10) He may direct the Rules to be laid before Parliament as required by sec. 129A. **129A**

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(11) He is required to submit for the approval of His Majesty the names of persons to constitute the Statutory Commission as contemplated by sec. 84A, with the concurrence of both Houses of Parliament. **84A**

(12) He is the President of his Council, *i.e.*, the Council of India with power to vote; and he ordinarily presides at the meetings of the Council. **7**

(13) He fixes meetings of the Council of India. **8**

(14) He prescribes the *quorum* for the meetings of the Council of India. **6**

Sec. (15) He is empowered to appoint any member to be the Vice-
2 President of the Council of India and to remove any person so ap-
7 pointed.

3 (16) He fills up any vacancy in the Council.

3 (17) *For any special reason of public advantage*, he has powers to reappoint any member of the Council for a further period of 5 years, though his term of office has expired.

9 (18) He has in writing to approve of all acts done at a meeting of the Council held in his absence.

9 (19) He must set forth his opinion and reasons therefor in the minutes of the proceedings of the meeting of the Council, in case of difference of opinion, on any question decided thereat.

10 (20) He may form small committees of the members of the Council for the more convenient way of transacting business.

Some of the powers of the Secretary of State referring to control over the administrative machinery in India are *relaxed* and thereby the Central Government is allowed to be more of a *Representative Government*.

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2 106. **Under-Secretaries:** The Secretary of State has two Under-Secretaries : one Parliamentary and the other permanent; the former is a member of Parliament and is generally a member of the British Cabinet. If the Secretary of State sits in the house of Commons, his Parliamentary Under-Secretary sits in the other house or *vice versa*. The Secretary of State gets a salary £5,000 p. a. and the Parliamentary Under-Secretary gets £ 1,500 a year. Both being members of Parliament and the Cabinet, are liable to lose their office with the change of Government or dissolution of Parliament. Salaries of both these officers are made payable out of the British revenues. It was contended in India that unless the British Treasury is made responsible for the salary of these officers, members will not take interest in the debates on India in the said august House. The other permanent Under-Secretary gets a salary of £ 2000 p. a.; this Under-Secretary is appointed on a *service-qualification*. It is also necessary to note that this Act has wrought another important change in respect of expenses beyond the payment of salaries of those two officers from the British Treasury. The expenses of that portion of the India office in England, *i. e.*, establishment meant for political and administrative functions) were, also in addition, placed on the British Estimates. Such expenses almost, amount to £ 130,000 annually.

At this stage, it may be noted that there was much of *agency work*, required to be done by the India office and the establishment expenses for this agency work remain payable as before.

Sec.
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107. Under-Secretaries of State: The Act of Indemnity (20 & 21 Geo. V, ch. 9): When the Labour Government was formed in England (in 1929), seven Under-Secretaries of State took their seats in the House of Commons in contravention of the provisions of sec. 4 of 21 & 22 Vict. ch. 106, as amended by 7 & 8 Geo. V, ch. 51 and sec. 3 of 16 & 17 Geo. V, ch. 18 which laid down that only (any) six principal Secretaries and (any) six Under-Secretaries can take their seats in the House of Commons. The Act (16 & 17 Geo. V, ch. 51) provides penalties for the breach of the said provision. The said seven Under-Secretaries had offended against the said provision and therefore had incurred liability. To indemnify them, the Under-Secretaries (Indemnity) Act was passed. Dr. Drumond Shiels was then the Under-Secretary of State for India; and he was indemnified by the said Act. However, he had to resign his office and Lord Russel was appointed in his place, he having his seat in the House of Lords.

108. Council of India: It is already observed that the Council in England was brought into existence with a view to *guide and advise the Secretary of state*. It was originally constituted under the Act of 1858 under the circumstances discussed in Chapter I *ante*. The constitution of the Council has been altered from time to time under various Acts of Parliament, being Acts of 1869, 1876, 1889, 1915, and the present Act. It is not necessary for our purpose to go into the details of the past changes; suffice it to say that the present constitution is the result of experience and great agitation.

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109. Provisions of the Section: (a) The Council of India shall consist of such number of members—not less than 8 and not more than 12—as the Secretary of State may determine; provided that the Council as constituted at the time of passing this Act, shall not be affected by this provision, but no fresh appointment thereto shall be made in excess of the maximum prescribed by this section.

(b) The right of filling any vacancy in the Council shall be vested in the Secretary of State.

(c) One half of the members of the Council *must be* persons who have served or resided in India for at least 10 years, and have not last left India more than 5 years before the date of their appointment; the person appointed to fill the vacancy must possess the aforesaid qualifications.

Sec. 3 (d) Every member of the Council shall *hold office*, except as by this section provided, *for a term of 5 years*.

(e) The Secretary of State may, for special reasons of public advantage, reappoint for a further term of 5 years any member of the Council whose term of office has expired. In any such case the reasons for the reappointment shall be set forth in a minute signed by him and laid before both Houses of Parliament.

(f) Any member may, by writing signed by him, resign his office.

(g) Any member may be removed by His Majesty from his office on an address by both Houses of Parliament.

(h) Each member shall be paid the annual salary of £1,200, provided that any member domiciled in India at the time of his appointment, shall be paid an additional sum of £600 annually. It is made *optional* for the payment of such salary either out of the Indian Revenues or out of the monies provided by Parliament.

(i) Such service shall be considered 'service under the Crown' for the purposes of determining question of annuity, pension, etc.

110. Object of Appointment of the India Council: When the Government of India Act, 1858, was on the anvil of Parliament, Lord Derby stated: "..... inasmuch as it was impossible to conceive that any person (i. e., the Secretary of State for India) so appointed would have sufficient knowledge and experience to discharge duties so various and so complicated..... it was necessary for the good government of India to associate with the Minister a Council..... by whom he might be assisted and advised." According to the Crew Committee, the Council was to act as a counterpoise to the centralisation of powers in the hands of the Secretary of State. It may be noted here, that the majority of the members of the Crew Committee have recommended the abolition of the Council of India and the creation of a Statutory Advisory Committee in its place and stead. Prof. Keith (a member of that committee) opined in a dissenting minute that he was opposed both to the continuation of the Council and substitution of a Statutory Advisory Committee. According to him, the conservatism natural to retired officials had acted sometimes as a barrier in the way of useful reform.' He also expressed the opinion that the natural tendency to delay in the action of Government of India had been injuriously fostered by the delay of the India Office under the Council system. He also pointed out many instances in which the Secretary of State was moved to overrule the Government of India even in petty matters. Bhupendra Nath Basu opposed the continuation of the Council

in the following terms: "Firstly, the abolition of the Council will naturally result in the Secretary of State leaving things more and more to the Government of India and interfering only in matters of Imperial concerns; and secondly, it will thus throw a much greater responsibility on the Government of India which in its own interest will have to share it, with the representatives of the people apart from any question of statutory obligation. We shall thus bring about greater co operation and responsible association between the Government and the people and a greater reliance upon their conjoint action and pave the way to the attainment of self-government in India without much dislocation of machinery.... I am also opposed to an Advisory Committee with no responsibility and no statutory functions." According to Sir John Strachey, also, the Council was not a necessity.

111. Except in Eight Cases, the Secretary of State has powers to disregard the opinion of this Council.

112. Whether Necessary: This Council finds room for retired members of the Civil Service. This method of recruitment of its members is open to objection on several grounds. We shall refer to one of the important objections. During the course of their long service in India, they may have some grievance against the Government of India to whom complaints might have been made by the contending parties. The Government of India in its own turn would be required to refer such matters to the Secretary of State who is to be advised by his Council which has for its members the originally aggrieved or prejudiced party or a member thereof. In actual working, therefore, such members will be called upon to sit in judgment upon their own actions or the actions of their party. Many objections have been discussed hereinabove also. It is necessary to invite attention to one important anachronism. By a convention (which we shall discuss later) it is understood that the duty of safeguarding Indian interests in financial matters should rest with the Government and the Indian Legislature. The India Council would not be called upon to interfere on account of such convention. Under those circumstances and because of the powers of the Secretary of State to overrule his Council, it is contended in India that this Council is unnecessary and a burden on India. The consensus of opinion in India is for the abolition thereof.

113. Recommendations by the Indian Statutory Commission : (Vol. II, Paras 355, 356 and 357.) The Commissioners think it to be necessary to maintain its existing powers for some time longer. One of the reasons is the protection of the services, because under sec. 96E of the Act, the Civil Officials could be employed with the concurrence of a majority of votes at a meeting of the Council. Com-

- Sec.** missioners consider it *absolutely essential* to reassure officers in regard to
3 their position under the new constitution. They assure that the council
 will, in the future as in the past, contain distinguished officials whom
 the general body of officers would regard as adequately representing
 their interests. The Commissioners recommended that the Council
21 should not retain the power to veto expenditure given by section 21 of
 the Act on the ground that the provincial expenditure will be mainly
 voteable by and will be subject to the control of the provincial council
 as recommended by them in that behalf.

With a view to appease Indian agitation on the question of the present practice of having retired officials, the Commissioners recommended that the interval between leaving India and appointment to the Council should not exceed one year. It may be noted that they attach great importance to securing the members appointed from India, whether they are officials or non-officials who should have recent experience of the country.

114. Proposals in White Paper: India Council: The Secretary of State's Advisors: Services: His Majesty's Government do not regard a Council of the kind which has been associated with the Secretary of State for India since 1858 as any longer necessary in, or appropriate to, the conditions of the new Constitution. They deem it necessary, however, to have a Board of Advisors to advise the Secretary of State on certain heads. (Para 67, Introduction).

His Majesty's Government regard "the Secretary of State in Council of India" and the present powers of veto, etc., incompatible with the proposed Federation and with Provincial self-Government. The proposals, therefore, contemplate the vesting in the Crown on behalf of the Federal Executive and the Provincial Executives respectively of all property now held in the name of the Crown which is required for their respective purposes, and these authorities will be endowed with the right to enter into all contracts, etc.. (Para 68, Introduction).

As regards the Secretary of State in Council, it is proposed to enable him to appoint some advisors (at least two of whom must have served the Crown in India for not less than 10 years) to hold office for 5 years, (Para 69, Introduction).

It is proposed, therefore, that on the commencement of the Constitution Act the Council of India as at present constituted will cease to exist. But the Secretary of State will be empowered to appoint Advisors as stated herein. Any person who is so appointed will hold office for a term of five years, will not be eligible for reappointment,

and will not be capable, while holding his appointment, of sitting or voting in Parliament. The salary of the Advisors so appointed will be fixed by the Act and will be defrayed from monies provided by Parliament. The Secretary of State will determine the matters on which he will consult them, either individually, or collectively. However, with reference to the control of any members of the Public Services, he will be required to lay before his Advisors and to obtain the concurrence of the majority of them (1) before drafting any rules which he proposes to make for the purposes of regulating conditions of service, and (2) any order which he proposes to make on an appeal admissible to him under the Constitution Act from any such member. (Paras 176, 177, 178 & 179, Proposals).

It is submitted that even the Board of Advisors as proposed is unnecessary owing to the reasons discussed in the next para.

115. Whether Justifiable?: It is already discussed whether the India Council is a necessity or not. The grounds on which the Commissioners recommend are such that the recommendations are bound to raise a great controversy over the subject. The consensus of Indian opinion is bound to be against the ground on which the council is proposed to be retained owing to the reasons stated hereinabove.

116. Tenure: By the Act of 1858, members held office during *good behaviour*, but were removeable on an address by both Houses of Parliament. By the Act of 1869, this term was changed to a period of 10 years with similar powers of reappointment as provided for in this Act; by the Act of 1889, the period of office was reduced to that of 7 years; and the present Act fixes 5 years' period, so that there may be a continuous flow of fresh experience which, it is alleged, is much needed in this progressive stage.

117. Number of Members: By the Act of 1858, the number of members was fixed at 15; by the Act of 1889, it was reduced to 10; by the Act of 1907, the minimum was fixed at 10 and the maximum at 14; and the present Act fixes the minimum at 8 and the maximum at 12.

118. Changes: (a) The maximum strength of the Council was fixed at 12 and minimum at 8; (b) one-half of the members (and not 9 as before) were required to be persons who have either served or resided in *India* (instead of *British India* as before provided) and have not last left India more than 5 years before the date of their appointment; period of office is reduced to 5 years instead of 7; and (c) the salary is fixed at £1,200 a year and the Indian Members are given an additional allowance of £ 600 a year. Besides these prominent changes some other changes have taken place either by convention or by rules; (d) The salaries are

- Sec. 3** being paid *out of monies provided by Parliament* and not out of the Indian Revenues; (e) some of the agency functions are transferred to the High Commissioner newly appointed under this Act; and (f) 3 Indian Members are appointed on the Council instead of 2.

119. Agency Function: We have several times used this technical phrase meaning whereof should be clearly understood. The Government of India has to perform certain acts and deeds in Europe, e. g., purchasing stores, etc. The Government of India has supreme voice in these matters. There must be somebody in Great Britain to carry out the Government of India's proposals. This was, hitherto, done by the Secretary of State in Council, who were to carry out the proposals without their interference; as they had to act as mere agents of the Government of India; this part of their work is known as *agency work*.

- 4** Any member of the Council of India is *capable of neither sitting nor voting in Parliament*. The reason of the bar is that the Council should not be allowed to be divided on *party lines*. This restriction was first introduced by the Act of 1858 on the same ground.

- 5** **120. Duties, Functions, Procedure, etc., of the Council:** The Council of India shall under the directions of the Secretary of State, and subject to the provisions of this Act, conduct the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India. The power vested in the Secretary of State in Council and in the Council of India shall be exercised at the meetings of the Council at which such number of members are present; quorum may be prescribed by general direction of the Secretary of State. The Council may act in spite of any vacancy therein.

- 8** It must be convened and held as and when the Secretary of State directs, but one such meeting *at least* shall be held in every month.

- 7** The Secretary of State is the President of the Council with power to vote. He may appoint *any Member* of the Council to be *Vice-President* thereof, and similarly he can remove such Vice-President from the office at any time.

- 9** **121. Procedure:** The Secretary of State, when present, presides at every meeting of the Council; in his absence, the Vice-President appointed by him as provided for in this Act, presides; if he, also, is absent, one of the members elected by the members present at the meeting, presides. In the event of the council being equally divided at a meeting, the presiding person has a *casting* (i.e., a second) vote. Any act done at a meeting of the Council in the absence of the Secretary of State, *requires* the approval *in writing* of the Secretary of State for its

validity. In case of difference of opinion on any question decided at *the meeting*, (i) at which the Secretary of State is present, his decision shall be final except in those (eight) cases, where the concurrence of a majority of votes is expressly required by the Act. In such cases of difference of opinion, the Secretary of State and any other member who may be present, may require their individual opinion with the reasons to be recorded in the minutes of the proceedings. Sec. 9

122. The eight cases in which the Secretary of State is bound to act in concurrence with a majority in the Council: (1) The expenditures of the Revenues of India, both in Britain and elsewhere, shall be subject to the control of the Secretary of State in Council and *no* grant or appropriation of part of the Indian Revenues shall be made without the concurrence of a majority; (2) sale, purchase, mortgage, etc., of any movable or immovable property; (3) making any contract; (4) making any change affecting salaries of the Viceroy's Cabinet; (5) making rules regarding leave, absence, etc., of persons serving under the Crown in India; (6) making rules as to distributing powers amongst several authorities for making appointments, etc., to offices under the Crown; (7) sanctioning any rules, regulating appointments to offices in the Indian Civil Service as provided for in sec. 99; (8) approval of provincial appointments as required by sec. 100. 21
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123. Committees of the Council: For the purposes of division of work and more convenient transaction of business, it has been provided that the Secretary of State may constitute small committees of his Council, entrusting each such committee with certain departments. He may also generally direct the manner in which the business of the Secretary of State in Council or the Council of India shall be transacted, and any order made or act done in accordance with such directions shall, subject to the provisions of this Act, be treated as being an order of the Secretary of State in Council. *To these committees, matters connected with the various branches of administration are referred before being finally placed before the Secretary of State in Council.*

Committees referred to hereinabove are: (1) Finance, (2) Political and Secret, (3) Military, (4) Revenue and Statistics, (5) Public Works, (6) Stores, and (7) Judicial and Public.

124. Correspondence: The Secretary of State in Council may prescribe, subject to the provisions of this Act, the procedure for correspondence between India Office and the Government of India or any Local Government (*i.e.*, Provincial Government) in India. During the pre-Reform period, the correspondence proposed to be sent to India was 11

- Sec. 11** required to be placed before the Council or on the Council Table, for 7 days prior to its issue unless it was 'very urgent' or 'secret' in the opinion of the Secretary of State.

125. Effect of the Change : No doubt, to simplify the procedure this change is made ; but that does not absolve the Secretary of State from his obligation to consult the Council before the correspondence is despatched and specially in those cases in which he is bound to act with the opinion of the majority of the Council. However, he continues to be the sole judge of 'secret' matters and he can avoid consultation with his Council in such matters as he thinks to be secret, before the correspondence is despatched to India. The section is made more elastic.

- 15 126. Communication to Parliament regarding Hostilities :** When any order is sent to India directing the actual commencement of hostilities by the Crown's forces in India, the fact of the order having been sent shall, unless the order has in the meantime been removed or suspended, be communicated to both Houses of Parliament within three months, after the sending of the orders, or if Parliament is not in sessions at the expiration of those three months, then within one month after the next meeting of Parliament.

The reason of this provision is explanatory of the fact that Parliament must have the earliest opportunity to discuss the situation and to call upon the Government for explanation. Sec. 22 of the Act provides a safe-guard against abuse of powers as it requires previous sanction of Parliament for defraying the expenses of any military operations carried on beyond the frontiers of India, except, in very emergent cases.

- 17 127 Establishment of Secretary of State :** No addition may be made to the establishment of the Secretary of State-in-Council nor to the salaries of persons of that establishment without Order of His Majesty-in-Council (*i.e.*, the British Cabinet) and without the same being laid before both Houses of Parliament within 14 days after the meeting thereof; subject to this provision, the Secretary of State in Council may make all appointments, etc., in the same establishment.

- 18 128. Pensions and Gratuities :** The Crown may, by warrant under the *Royal Sign-Manual* and countersigned by the Chancellor of the Exchequer, grant any officer, appointed on the establishment as hereinabove provided, compensation, pension, etc.

- 19 129. Military Appointments :** The same provisions apply to military appointments. The tenure of all Military appointments is *during pleasure of the Crown*.

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130. "During Pleasure" means that the employee continues in his office until the Crown so desires, he being liable to be dismissed without any reason being assigned, if the Crown so wills it. "During good behaviour" means that an employee is not liable to be dismissed or removed from his office, except, for such misconduct as would, in the opinion of a Court of Law, justify his removal. Auditor of Indian Accounts holds his office during good behaviour.

131. **The Secretary of State's Control Over Transferred Subjects:** 19A
It has been noted above that some of the heads have been reserved by the Government for administration, subject to the control, guidance and superintendence either of the Government of India or the Secretary of State: whereas some heads are transferred to ministers (by whose advice the Governor shall be guided) responsible to the local Legislature. In the Joint Report it was recommended: "Now that His Majesty's Government have declared their policy of developing responsible institutions in India we are satisfied that the Parliament must be asked to assent to set certain bounds to its own responsibility for the internal administration of that country. Parliament must be prepared to forego the exercise of its own power of control and that this process must continue *pari-pasu* with the development of responsible government in the provinces and eventually in the Government of India." The Joint Select Committee also recommended that over transferred subjects the control of the Governor-General in Council and the Secretary of State ought to be restricted in the narrowest possible limits. Pursuant to this recommendation and under section 194 of the Act, the following rule by the Government of India notifications No. 835G dated the 14th December 1920, was made:

"The powers of the superintendence, direction and control vested in the Secretary of State and the Secretary of State in Council under the Act or otherwise shall, in relation to transferred subjects be exercised only for the following purposes, *viz* :

- (1) to safeguard the administration of central subjects ;
- (2) to decide questions arising between two provinces in cases where the provinces concerned fail to arrive at an agreement ;
- (3) to safeguard Imperial interests ;
- (4) to determine the position of the Government of India in respect of the questions arising between India and the other parts of the British Empire ; and
- (5) to safeguard the due exercise and performance of any powers and duties possessed by or imposed on the Secretary of state or the Se-

Sec. 19A Secretary of State in Council, under or in connection with or for the purposes of the following provisions of the Act, *viz.*, section 29A, 30 (1A), part 7A or of any rules made by or with the sanction of the Secretary of the State in Council."

AGI As required by the Devolution Rule 27, the Local Government (*i.e.*, the Government of a Governor's province), will have power to sanction the expenditure on transferred subjects to the extent of any grant voted by the Legislative Council; but there are some cases mentioned in Schedule 3 in Devolution Rules in which the previous sanction of the Secretary of State in Council or that of the Governor-General in Council is required to include a proposal for expenditure on the transferred subjects. Similarly, with reference to transferred subjects relating to non-votable heads of expenditure enumerated in section 72D, approval of the Secretary of State in Council or that of the Governor-General in Council is required to be taken to authorise any expenditure. The reason for reserving the control over expenditure on transferred subjects is that the question is likely to affect the prospects or the rights of the All-India Services, and other Imperial questions.

The following are the cases in which previous sanction of the Secretary of State in Council is necessary:

(1) The creation of any new or the abolition of any existing permanent post or to make any change in the pay of the incumbent of any permanent post of an All-India Service; (2) the creation of a permanent post on a maximum grade of pay exceeding Rs. 1,200 a month, (3) the creation of a temporary post with pay exceeding Rs. 4,000; (4) the grant of an allowance, etc., to any Government servant or his family not allowed under the rules with certain exceptions; and (5) any expenditure on the purchase of imported stores or stationery otherwise than in accordance with such rules as may be made in this behalf by the Secretary of State in Council. In the last three cases, the Governor-General in Council, if they agree with the recommendations, may grant the same, but if they disagree they *must* forward the recommendations with their opinion to the Secretary of State.

132. The Recommendations of the Indian Statutory Commission in that behalf (Vol. II, Para 350): In view of the Commissioners having recommended in the Governor's provinces that the administration of the whole provincial field should be by Governments responsible to provincial legislatures (which recommendations we shall discuss later), they opine that it should no longer be open to the Secretary of State to issue orders on matters which are of no concern outside the province itself other than

the limited class in regard to which special powers are reserved to the Government. But he should be authorised to require the Provincial Government to furnish such information as he thinks necessary. If the constitution broke down in any province, the responsibility for its government would again fall upon Parliament and it is essential that the Secretary of State should be able to keep himself fully informed of everything that may concern this ultimate responsibility of Parliament.

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Would-be effect in actual working: If these recommendations are accepted, with the past experience and knowledge, it is apprehended that with the powers proposed to be given, the provincial autonomy might not be established in effect and in actual working.

133. His control over the Central and Reserved Subjects: There is nothing to be added to what has been stated previously with reference to the powers of the Secretary of State over the administrative machinery of India. In respect of these heads the control, etc., of the Secretary of State are not relaxed; but in actual working, the Secretary of State is not expected to constantly interfere in the ordinary work of the Indian Administration. It is not the principal function of the Home Government to direct the details of administration but to scrutinize and revise the past acts of the Indian Government and to lay down the principles and issue general instructions for their future guidance. But the Home Government would generally interfere in political problems of great importance and may give or refuse sanction in great political and financial measures which are referred to them for approval. In theory, the Governor-General has got wide powers, but in practice, he does not exercise them to avoid responsibility, and consequently in matters even of ordinary importance, the Government of India invite the opinion and instructions from the Secretary of State. Sir John Mill and others have expressed opinion almost in the aforesaid terms with reference to the relations of the Government of India and the Secretary of State. It, also, sometimes depends upon the Secretary of State who is then in office. Some Secretary of State of conservative disposition might meddle with the administration in India even in the most trifling and unimportant affair. The Right Hon'ble Sir Tej Bahadur Sapru who was a member of the Viceroy's Cabinet under the reform period says: "The policy for India.....and sometimes even in unimportant ones the policy in India is formulated not at Delhi, nor at Simla, but in Whitehall." Rules under section 21 of the Act are framed by the Secretary of State in Council to the effect that the previous consent of the Secretary of State in Council shall be taken in certain classes of expenditure relating to such subjects, by the Government of India or the Local Government, as the case may

Sec. be. Such previous sanction is required to be taken before the demands
19A for grants are submitted either to the Indian Legislative Assembly or to the local Legislative Council except in cases of extreme urgency when such consent can not be obtained even by cable.

134. Recommendations of the Indian Statutory Commissioners in that behalf (Vol. II para 351): The Commission has not recommended responsible form of Government at the Centre. According to them, therefore, the Government of India remains responsible to Parliament. That being so, the Governor-General and the Governor-General in Council must continue to be subject, as at present, to the orders of the Secretary of State. The Commissioners go a step further and state that Parliament being ultimately responsible, it is incumbent on the Government of India not only to keep the Secretary of State continuously and closely informed about it but to take his orders before decisions are made, for he may be held responsible for them in Parliament.

In actual working: It must have been observed that for the last about five years, the Whitehall is reported to have dictated to the Government of India even in petty matters, e.g., the collection of revenue, arrest of any individual, etc. The powers that are now proposed to be given to the Secretary of State by the Indian Statutory Commission are wider and may, therefore, strengthen the hands of any imperialistic Secretary of State. It would, therefore, be not surprising if the consensus of the Indian responsible opinion would be against the present recommendations.

135. Fiscal Policy and the Home Government: The Secretary of State should as far as possible avoid interference on this subject when the Government of India and the Indian Legislature are in agreement and it is considered that, his intervention when it does take place should be limited to safe-guard the international obligation of the Empire or any fiscal arrangements within the Empire to which His Majesty's Government is a party." In these words the Secretary of State in a dispatch dated 30th June 1921 had expressed his views on behalf of His Majesty's Government on this subject. The appointment of a Tariff Board and the recent enactment of a protective measure, protecting the Indian Steel Industry, show that India enjoys some amount of fiscal freedom. India wants fiscal autonomy—at least in the provinces, but it is not yet granted.

One of the specific recommendations made by the Committee on the Home Administration of Indian affairs was as follows: "Where the Government of India are in agreement with a majority of non-

official members of the Legislative Assembly either in regard to legislation or in regard to resolution on the budget or on matters of general administration, assent to their joint discussion should only be withheld in cases in which the Secretary of State states that his responsibility to Parliament for the peace, order and good government of India for paramount consideration of Imperial policy refuses him to secure recommendations of the matter at issue by the Legislative Assembly." The Joint Select Committee, *inter alia*, stated: "Nothing is more likely to endanger the good relations between India and Great Britain than a belief that India's fiscal policy is dictated from Whitehall in the interests of the trade of Great Britain. That such a belief exists at the moment there can be no doubt. That there ought to be no room for it in the future is equally clear.....It cannot be guaranteed by a statute. It can only therefore be assured by an acknowledgment of a convention whatever be the right fiscal policy for India for the needs of her consumers as well as for her manufacturers, it is quite clear that she should have the same liberty to consider her interests as great Britain, Australia, New Zealand, Canada and South Africa. After this expression of opinion, the fiscal convention was laid down in the terms hereinabove stated.

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136. Fiscal Autonomy Convention in Actual Working: Whether Operative? In March 1930, there was an important question raised with reference to the fiscal autonomy convention on the debate on the Tariff Bill in the Legislative Assembly. Sir George Rainy, speaking on behalf of the Government, is reported to have addressed on the subject to the following effect. He said that he would define what exactly the fiscal autonomy convention was in the opinion of the Government of India. At that stage, the Speaker pulled up Sir George Rainy by questioning him as to who was to interpret the convention. Sir George Rainy stated that he was merely to submit the opinion of the Government of India and leave it at that. Proceeding he said: "The first was that the Government of India should devise those Tariff arrangements which best fitted for India's needs as an integral part of the British Empire. It was for the Government of India to take the initiative for devising such tariff arrangements. So, under the Convention the Government is to devise arrangements and place them before the Legislature. Thereafter, it was laid down in the Mont-Ford Report that the Secretary of State should not, as far as possible, interfere, when the Government of India were in agreement. The Committee did not pursue the point further, as it assumed that the Government of India and the Legislature would discharge their respective functions according to constitutional practice on the British model. The fiscal autonomy

Sec. convention means this that while there is *always* previous consultation with the Secretary of State, the fiscal decision as to the proposals to be placed before the Legislature rests with the Government of India and none else." Continuing Sir George said: "In this case apart from previous consultation with the Secretary of State the Government of India's position is that of a Dominion Government which places proposals before the Legislature. *To that extent the Government of India is independent.* But how long does this position of independence continue? It continues till the Legislature pronounces on them. *In the Dominions, if the Legislature does not agree there is a change of Government which restores harmony. In India, under the present constitution, no such result is provided for so that if the Government and the Legislature do not agree the convention ceases to operate.*" Referring to the speech of the Secretary of State in the House of Commons in that behalf, Sir George Rainy said that his speech in the Commons referred not to any new convention but to the one which had been in the operation for 10 years, which showed that whenever there had been agreement between the Government and the House, the Secretary of State refrained from interference. "*If the Government and the Legislature are not in agreement there is no means of resolving the deadlock under the present constitution till by persuasion one side wins over the other.*" While, therefore, in the sphere of tariffs, India already '*possesses Dominion Status, it does not yet possess a Dominion constitution.*'

If according to Government, the last word remains with the Governor-General in Council or with the Viceroy with the powers of *veto*, it would not be difficult to submit that the statement that the fiscal autonomy convention prevails is an anachronism and contrary to all intents and purposes. When the said convention was laid down the authors did know of the present constitution of the Executive Government; and therefore constitutionally it would be a question whether Government is justified in construing the said convention in the way in which Sir George Rainy did. Till his said interpretation, all schools of political thought in India were of opinion that when the majority of the elected non-official members of the Indian Legislative Assembly expressed a certain opinion with reference to the fiscal question the Government of India was bound to obey and in that event the Secretary of State could not interfere.

Technically, Sir George Rainy may be right in his interpretation but the interpretation was against the intent and prevalent feeling regarding the said convention. If one looks to the Selbourne Report, Crew Committee's recommendations, the Report of the Joint

Select Committee on the Government of India Bill and the Report of the Indian Fiscal Commission, 1921-22, one could not agree with Sir George Rainy's interpretation. Sir George Rainy confuses the two issues (1) of Dominion Status and (2) of Dominion Constitution. If India has Dominion Status in the sphere of fiscal autonomy, it is not absolutely necessary to have a dominion constitution. It may be noted that Mr. Wedgwood Benn in the House of Commons while speaking on the Fiscal Autonomy Convention said, the final discussion (regarding fiscal questions) rests with the Assembly. If that is the opinion of the Secretary of State, Sir George Rainy's interpretation could not be upheld. If that interpretation was to prevail, there was no necessity to lay down any fiscal convention. The fact that such a convention was required to be laid down clearly shows that the Government was to follow the vote of the Assembly. Founders of the convention knew very well that India had no Dominion Constitution and therefore the Executive Government was not responsible to the Legislature; and with this knowledge, they laid down the convention; and when Sir George admits India's Dominion Status in fiscal affairs, his interpretation is subject to grave doubts. If the authors of the said convention intended it to mean what Sir George Rainy said, the said convention would have been worded in the following terms: "The true state of the (alleged) fiscal autonomy is nothing more or less than a recognition of only Government proposals with regard to finance which are accepted by the Indian Legislature and by the Secretary of State." In effect, it comes to this that the Secretary of State would favourably consider the fiscal questions which would neither affect the Imperial interest nor the British Treasury.

Currency Policy—Gold Standard—Financial Convention—Two Ordinances of 1931 relating thereto, etc.: In 1927, an Act was passed known as the Currency Act, 1927, being Act No. V of 1927. Sec. 5 thereof laid an obligation upon the Government to sell gold at a certain rate (approximately at Rs. 21.3-10 per tola). Owing to the said provision, the price of gold remained much controlled.

In 1931, there was a financial crisis in England. A provision similar to the said sec. 5 also existed in England. The Government of England thought it necessary to abandon the gold standard for the purpose of meeting the emergency. The Parliament therefore passed the necessary Act for that purpose. Following a similar policy which was in the best interests of India, the Governor-General promulgated the Ordinance (deriving his power from sec. 72) being Ordinance VI of 1931, whereby the said sec. 5 of the said Currency Act, 1927, was, tempora-

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Sec. rily, repealed and made inoperative. However, only a few days there-
19A after, another Ordinance being Ordinance VII of 1931 was promulgated whereby the previous Ordinance was repealed and the sec. 5 was re-enacted in another form.

The constitutional convention regarding fiscal autonomy has been discussed hereinabove. It is contended that Ordinance VII of 1931 was not passed in consonance with the financial policy then adopted by the Government of India as desired in the best interests of India. The financial policy underlying Ordinance VI of 1931 was in the interests of India and was one pursued by the Government of India. If there was no outside influence, no occasion could have arisen to repeal the said Ordinance and promulgate another instead, laying down a contrary provision and policy.

137. Constitutional question : An important constitutional issue arises from the financial policy pursued by the Government, and the said Ordinance promulgated by the Viceroy. The said issue is whether the said financial policy and the Ordinance are *ultra vires* and unconstitutional.

We have given the texts of various Royal Proclamations since 1858, (pages 19 to 25 *ante*). The attention is particularly invited to paras 2, 6, 7 and 17 of the Royal Proclamation of 1858; (pages 19 & 20 *ante*). It is explained by H. M. the Queen's letter dated the 15th August 1858 (page 20 *ante*) and further confirmed by the subsequent Royal Proclamations of 1908 and 1911. These Royal Proclamations have, it is contended, the same effect in law as an Act of Parliament (Hals., Hailsham Edn., Vol. VI, pages 600 & 601, para 776.) By His letter dated the 24th May 1910, H. M. the King described the previous Proclamations as Charters; (page 22 *ante*).

It is contended that by para 7 of the Royal Proclamation of 1858, the written and unwritten constitutional doctrines, duties and obligations prevailing in England have been made applicable to India. By para 17 thereof, the Crown undertook obligations regarding industry and works of public utility; thereby H. M.'s Government undertook to administer the government in India for the benefit of all the subjects of the Crown resident therein.

If these provisions have the same legal effect as contended, the question that arises is whether the present financial policy and the acts of Viceroy are *ultra vires* of the said Royal Proclamations and sec. 65 of the Government of India Act.

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It may be argued on behalf of the Crown that the said Royal Proclamations can, at the most, be construed as general Preambles. We have discussed this question on page 61 *ante*. It may be contended that a Preamble cannot restrain the operation of any enacting clause, meaning thereby that the operative clause may be wider than the Preamble; (*Copeman vs Gallant*, 1 P. Williams, 314); but, this clause can, it can be contended, be neither inconsistent with nor contrary to the Preamble. And, if it is found either inconsistent with or contrary to it, it may be held to be *ultra vires* of the said Proclamation and sec. 65 of the Government of India Act.

There are some cases which may be found useful in considering such questions. (*King vs. Authos*, 8 Mad. 144; *In re: Annie Beseant*, 39 Mad. 1085; an appeal was filed in the Privy Council against it, but it seems that their Lordships have not expressly overruled the observations of the Ag. C. J.; 49 Mad. 237, 242; 1 Bom. 367 P. C.; 39 Bom. 279, P. C.; 45 Bom. 196; 45 Bom. 1161; 48 Bom. 43; 15 Bom. L. R. 27; 22 Bom. L. R. 609, P. C.; 23 Bom. L. R. 492; 28 Bom. L. R. 1498; 29 Bom. L. R. 1227, P. C.; 29 Bom. L. R. 1511; 29 Bom. L. R. 1551-7; 37 All. 338; 40 Cal. 391-9, P. C.)

Another argument, that may be advanced in favour of the same being *ultra vires* is whether the same affects the allegiance of the subjects of the Crown. By para 2 of the said proclamation of 1858, Indians were asked to bear allegiance to the Crown on certain promises therein given and duties and obligations undertaken by the Crown. If by any Act or Ordinance, the said allegiance is affected, it can be contended that it is *ultra vires*. (*Empress vs. Burah*, 4 Cal. 172, P. C.; 40 I. A. 48; 39 Mad. 1085; *Bugga vs. Empress*, 22 Bom. L. R. 609-17, P. C.; 6 Beng. L. R. 459.)

If, therefore, it is proved to the satisfaction of the Court that any Act, Ordinance or policy relating to currency, finance, etc., does not stimulate the peaceful industry of India, promote works of public utility and improvement and if it is further proved that owing to any Act, Ordinance or policy, the Government is not administered for the benefit and in the interest of H. M.'s subjects resident in India, it may be held that such an Act, Ordinance or policy is *ultra vires* of the said Royal Proclamation and sec. 65 of the Government of India Act. Or, if it is proved that by such a policy, Act or Ordinance, the allegiance of the subject is affected it may be held *ultra vires*.

138. **Indian statutory Commission and Fiscal autonomy Convention:** (Vol. II, Para 362): According to the Commission, the Secretary of State has bound himself not to interfere if the Government of India

Sec. and the Assembly are agreed upon a particular policy. They do not suggest any modification in the convention itself, but according to them the assumption underlying such delegation (of the fiscal powers by convention) is that the Governor-General's approval of the course proposed is arrived at independently of the views of the Assembly; and *that it takes account of all Indian interests and not merely of those for which a majority of the Assembly speak*. Such a statement of the Commission, to a certain extent, upholds Sir George Rainy's views. But the Commissioners regard it as inevitable that the Government in India will in future become more and more responsible to the views of the Legislatures; and when it so happens the Government's power to resist the view of the Assembly will decrease. They do not recommend any extension of the principle of the fiscal convention. They propose that any extension of the principle, if at all it is required to be extended, should only be made with the approval (by Resolution) of both Houses of Parliament.

19A **139. Relaxation of Control of Secretary of State:** This section provides that the Secretary of State in Council may by rule regulate and restrict the exercise of the powers of superintendence, direction and control, notwithstanding anything in this act, so that sufficient effect may be given for the purposes of these reforms. However, rules affecting reserved subjects are required to be placed before both Houses of Parliament for their approval. With reference to rules affecting transferred subjects made under this section, they shall be laid before both Houses of Parliament as soon as after they are made, and if an address is presented to His Majesty by either House of Parliament praying that the rules or any of them may be annulled, His Majesty in Council may annul the rules or any of them and such rule shall thenceforth be void; the same shall not have the retrospective effect, *i.e.*, it shall be void without prejudice to the validity of anything previously done thereunder. Such relaxation of control, etc., does not affect administration of Central subjects, as responsibility to Parliament in respect of such administration stands. It should also be noted that the Act does not lay down how far the control, etc., of the Secretary of State are to be relaxed but it is almost entirely left to the discretion of the Secretary of State; consequently, it depends upon the personality of the Secretary of State. It is impossible for the Indian public to rest satisfied with this change. It is argued by the Government that some convention shall be established whereby there shall be substantial relaxation of control of the Secretary of State, but India has not had benefit of such convention as yet. Everything that is brought is almost brought under the stipulated phrase: "The Secretary of State feels that his responsibility to Parliament for the peace, order, and good Government of India or paramount

considerations of Imperial policy, require him to secure reconsideration of the matter at issue by the Legislative Assembly."

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Even as regards budget, the Legislative Assembly can express its view thereon only by way of resolutions which are merely advisory in character and without having legal binding. The Government is not bound to accept such resolutions.

140. The Transferred Subjects: The transferred subjects are entrusted for administration to Ministers (by whose advice a Governor is bound unless he has sufficient reasons to disagree), who are responsible to Local Councils; the cases in which the Secretary of State and his Council have the power of control, etc., are already discussed.

In spite of this provision, the Government of India are bound to furnish the Secretary of State with such information as the India Office may call for with a view to submit such information to Parliament to whom he (the Secretary of State) is responsible.

We have referred to the rules and conventions by means of which the control of the Secretary of State over the Government of India and the Local Governments is relaxed; such rules and conventions, in short, are as follows: (1) *Purely Indian Interests*: Regarding budget or matters of general administration, when the Government and the majority of non-official members of the Indian Legislative Assembly are in agreement, the Secretary of State would not intervene save in exceptional cases, viz., when he finds that his responsibility to Parliament for the peace, order, and good government of India or paramount considerations of Imperial Policy call upon him to reconsider the matter or matters at issue. (2) *Fiscal Policy*: In this behalf also, the Secretary of State should not interfere when the Government of India and the Indian Legislative Assembly are in agreement; his intervention should be limited only in the exceptional circumstances stated hereinabove, or for safeguarding the international obligations of the Empire or any fiscal arrangements to which the British Cabinet is a party. The Joint Parliamentary Committee in recommending this convention, observed: "Nothing is more likely to endanger the good relations between India and Great Britain than a belief that India's Fiscal Policy is in the interests of the trade of Great Britain....." (3) *Local Governments*: In purely Provincial matters, where the Provincial Government and the Legislature are in agreement their view should ordinarily be allowed to prevail.

141. Imperial Interference in Dominions: It would be interesting to note as and by way of contrast the extent of Imperial interference

Sec. with the administration of a self-governing dominion. According to
19A Prof. Keith, the Governor never refuses his assent to any Bill save on ministerial advice even though he has absolute discretion to refuse to assent to any and every Bill. The Governor in the dominions has no real control of any public officer..... in effect cannot do any executive act effectively without ministerial aid." In his opinion, the degree to which the Imperial Government interferes in the affairs of a self-governing dominion has steadily decreased and now has probably reached its minimum, as it may safely be said that interference is so restricted as to render further restriction incompatible with *paramountcy*.

142. The Imperial Conference of 1926 has defined the Term **Dominion Status**, according to which, the dominions are absolutely independent within their own territories; they have even the right to remain neutral when England may be at war with any country. The Imperial Government has expressed its readiness to grant to a dominion the power to amend the constitution if it is so desired, *i.e.*, they can amend the Act of Parliament granting the constitution.

143. The Statute of Westminster, 1931, has given the legal meaning and sanction to the term Dominion Status and the various resolutions passed by Imperial Conferences of 1926 and 1930. See page 41 *ante*.

20 **144.** The Revenues of India and their application: Part II of the
to Act (sections 20 to 27) deal with the revenues of India and their appli-
27 cation. As the Secretary of State has to deal with this part of the
administration, we shall here consider this part of the Act.

20 The revenues of India shall be received for and in the name of the Crown, and shall, subject to the provisions of this Act, be applied for the purposes of the Government of India alone. These revenues include all the territorial and other revenues of or arising in British India and in particular (i) all tributes and other payments from the Indian States: (ii) all fines, penalties and forfeiture levied by the sentence or order of any Court of Law in British India; and (iii) all movable or immovable property in British India *escheating* or lapsing for want of an heir or successor or devolving as *bona vacantia* for want of a rightful owner.

There shall be charged on the said revenues alone (i) all the debts of the East India Company, (ii) all sums of money; costs, charges and expenses which would have been payable by the East India Company

out of the revenues of India in respect of the treaties, covenants, contracts, grants, etc., existing at the passing of the Act of 1858, (iii) all expenses, debts and liabilities lawfully contracted and incurred on account of the Government of India, and (iv) all payments under this Act except so far as is otherwise provided for under this Act.

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All property vested in the Crown under the Act of 1858 or this Act, to be received or disposed of by the Secretary of State in Council under this Act, shall be applied in aid of the revenues of India.

145 Rules in that behalf: Under section 21 of the Act, the necessary rules have been framed by the Secretary of State in Council. The effect of such rules is that the Governor-General in Council or the Governor in Council, as the case may be, may not sanction certain classes of expenditure relating to Central and Reserved subjects without the previous consent of the Secretary of State in Council. Such previous sanction is to be obtained before calling upon either the Legislative Assembly or Legislative Council, as the case may be, to vote thereon. However, a provision is made for a departure from this rule which is when an extreme urgency arises and when there is not sufficient time to obtain the necessary previous sanction even by cablegrams. As usual a provision is made to submit to the Secretary of State in Council, in such urgent matters, a statement showing all schemes for which supply has been asked before sanction has been obtained.

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146. Application of revenues to military operations: But, except for preventing or repelling actual invasion of the Crown's Indian possessions or under other sudden and urgent necessity, the revenues of India shall not, without the consent of Parliament, be utilised for defraying the expenses of any military operations carried on beyond the exterior frontiers of those possessions by the Crown's forces maintained out of these revenues.

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147. Note: The phrase "or under other sudden and urgent necessity" is an undesirable phrase in sec. 22 of the Act. It is apprehended that with the help of this provision the revenues of India could be applied without the sanction of Parliament, to defraying expenses of the operations carried on with the help of Indian troops beyond the Indian frontiers and in any part of the world.

148. Secretary of State and the Bank: Such parts of the revenues of India as are sent or remitted to the United Kingdom and all money arising or accruing in the United Kingdom from any property or rights vested in His Majesty for the purposes of the Government of India or from the sale or disposal thereof shall be paid to the Secretary

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Sec. 23 of State in Council to be applied for the purposes of this Act. All such revenues and money shall, except as provided by sec. 23 of the Act, be paid into the Bank of England to the credit of an account which shall be opened in the name, "The Account of the Secretary of State in Council of India." The money so placed shall be paid out on drafts or orders which are required to be signed by two members of the Council of India and countersigned by the Secretary of State or one of his Assistant Under-Secretaries or his Under-Secretary. The same may be signed in the alternative by the Accountant-General on the establishment of the Secretary of State in Council or by one of the two Senior Clerks in his department and counter-signed in such manner as may be directed by the Secretary of State in Council

The whole revenue is received in India, but about 25% of the same is spent in Great Britain in respect of what is technically called the "Home Charges", which means payments which the Government of India makes in that country for interests on debt, pensions, annuities, furlough allowances, etc. These remittances are effected by means of council-bills, telegraphic transfers and transfer of gold.

24 The Secretary of State in Council are empowered by sec. 24 to authorise by a power of attorney, all or any of the cashiers of the Bank of England (i) to sell and transfer all or any part of any stock standing in the books of the Bank to the account of the Secretary of State in Council; (ii) to purchase and accept stock for any such amount; and (iii) to receive dividends on any stock standing to any such account; and (iv) to direct the application of the money to be received in respect of any such sale or dividend.

25 **149. Securities:** All securities held by or lodged with the Bank of England in trust for or on account of the Secretary of State in Council may be disposed off as may be authorised and the sale proceeds thereof may also be accordingly applied.

21 **150. Control of the Secretary of State:** Subject to the provisions of this Act and rules made thereunder the expenditure of the revenues of India, both in British India and elsewhere, shall be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of these revenues shall be made without the concurrence of a majority of votes at a meeting of the Council of India.

It is already noted above that the Council of India have very little voice in the control over the administration of India; it is also

noted that there are about eight cases in which the majority of the Council of India have a voice and this is one of those instances. However, in actual practice, it is said that this strict provision is not strictly enforced. When expenditure is incurred on account of peace, war, etc., by the previous decision of the British Cabinet, the Council has merely to obey the Cabinet by the establishment of some convention.

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151. Accounts before Parliament and audit: Within the first 28 days during which Parliament is sitting next after the 1st day of May every year, the Secretary of State in Council are obliged to lay before Houses of Parliament an account of the revenues of India under the respective heads and an account of all the annual receipts and disbursement *at Home and abroad* for the purposes of the Government of India under such heads. Similarly, he is bound to lay estimates of the same for the financial year last completed and accounts of all stocks, debts, etc., chargeable on the revenues of India. He is also obliged to submit a list of the establishment of the Secretary of State in Council with the details of salaries, allowances, etc. The account shall be accompanied by a statement from the detailed reports from each province *in such form as best exhibits the moral and material progress and condition of India.*

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His Majesty may by warrant under His Royal Sign Manual counter-signed by the Chancellor of the Exchequer, appoint a fit person to be an auditor of those accounts. Such auditor is empowered to examine and audit the accounts of the receipts, expenditure, etc., and the Secretary of State in Council are bound to produce and lay before him all such accounts accompanied by proper vouchers, etc. The Auditor has to report to the Secretary of State with such remarks and observations as he thinks fit and state his approval or disapproval of such accounts. Moreover, he must specify therein any defects, inaccuracies or irregularities which may appear to him in those accounts or in vouchers, etc., relating thereto. He is also under an obligation to submit all his reports to Parliament. The Auditor holds office during *good behaviour* and his salary is payable either out of Indian revenues or out of monies provided by Parliament. Besides, he is in respect of super-annuation, pension or gratuity, in the same position, as if he was on the establishment of the Secretary of State in Council.

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152. Secretary of State's power—Property, contracts and liabilities
—**Power to sell, mortgage and buy property:** The Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, sell and dispose off any movable or immovable property for the time being vested in the Crown, and raise money

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Sec. 28 on any such property and purchase and acquire any property; all properties so acquired shall vest in his Majesty for the purposes of the Government of India.

This is one of the instances where the Secretary of State is bound to follow the opinion of the majority of his Council.

A covenant by the Secretary of State guaranteeing the performance of a decree by a private party is not an agreement within ss. 2 & 40 of the Act. The security given by the Secretary of State for an applicant in order to be valid must be shown to have been sanctioned by him with the concurrence of a majority of votes. *Srinibash vs. Kesho Prasad*, 38 Cal. 754.

29 **153. Contracts of the Secretary of State:** Subject to the provisions of this Act regarding the appointment of a High Commissioner for India, the Secretary of State may, *with the concurrence of a majority of votes* at a meeting of the Council of India, make any contract as required by this Act; such contracts are to be signed and executed as law requires other men to sign and execute. When a statute lays down certain mandatory provisions in regard to a form of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that should be taken as a precedent which will be binding upon the Secretary of State in every case. To bind him, contracts must be made in strict conformity with the provisions laid down in the statute. A mere Commandeering Order is an act of the Sovereign and is not a contract. (*Kessoram vs. Secretary of State*, 54 Cal. 969).

30 **154. New Change:** In the pre-reform period, the local Governments, *i.e.*, the Provincial Governments had no separate sources of revenue allotted to them but *under the present period* Local Governments are entrusted with certain heads—called Provincial Heads—for the purposes of revenue; and revenues under such heads are allotted to them. **Sec. 30** of the Act provides for the powers of Local Governments to borrow money on the *security of revenues so allocated to them*.

155. Case Law: If the Government acquires land under the Land acquisition Act, and if thereafter the owner wants to gift it away to the Government, the Government must reconvey the property to the owner to enable him to make a valid gift; (*Secretary of State vs. Chettiar*, 4 Rang. 291). **Sec. 30(2)** is mandatory and not merely directory. Therefore, the act of an unauthorised person is *ultra vires* and the contract entered into by him is not binding on the Secretary of

State. (Secretary of State vs. G. T. Sarin & Co., A. I. R. 1930 Lah. 364).

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The following are the purposes for which loans may be used: (1) to meet capital expenditure on the construction of any work, etc., of lasting public utility; such work must be so large that the expenses cannot be met from current revenues and the Governor-General in Council must be of opinion that such work shall yield a sufficient return; (2) to meet expenses of irrigation; (3) to open or to maintain relief works during famine, and (4) for repayment of previous loans. Before raising loans in India sanction of the Governor-General in Council is required, and if the loan is required to be raised outside India the sanction of the Secretary of State in Council is required.

156. Rights and liabilities of the Secretary of State in Council: The Secretary of State in Council may sue and be sued in the name of the Secretary of State in Council as a body corporate; neither the Secretary of State nor any member of his Council shall be personally liable in respect of any contract or assurance made by or on behalf of the Secretary of State in Council, or any other liability so incurred in his official capacity. All such liabilities and all costs and damages in respect thereof shall be borne by the revenues of India. 32

In India, the Secretary of State can be sued in an ordinary way by filing a suit after complying with the provisions of the Civil Procedure Code; but such an action does not lie in England where the procedure is somewhat different. In England, the procedure is by a Petition of Right. Such a Petition of Right could be made for damages, for breach of a contract or for any other action at common law, but it does not lie for a *tort*, on the ground that "the King can do no wrong." However, in respect of a *tort* the official can not plead the orders of his superiors.

157. Case Law: A suit cannot be filed against the Secretary of State for the wrong assessment of Income-tax. Sec. 67 is not *ultra vires* in that behalf; (R. N. Singha vs. Sec. of State, 5 Rang. 825). The Indian Legislature can limit the liability of the Government for loss or damage caused by its servants; and sec. 80 of the Burma Forest Act is not *ultra vires*; (Maung Po Keji vs. Secretary of State, 3 Burm. L. T. 150). However, if any Act adds to or takes away from the liability of the Secretary of State in Council, it is *ultra vires*; (A. M. Ross vs. Secretary of State, 37 Mad. 55).

158. High Commissioner: There was agitation in India that a High Commissioner should be appointed to carry out that part of the agency work, which was, hitherto, done by the India office. When this Act was under consideration, the said point was pressed and the principle 29A

Sec. 29A was accepted, the result being that a provision is made for such an appointment. *The High Commissioner* can be appointed by the Governor-General in Council with the approval of the Secretary of State for India in Council. He is made subordinate to the Government of India, and his salary and the expenses of his establishment are made chargeable on the Indian revenues. At present, he has not got all the powers enjoyed by other High Commissioners of Colonial Governments.

His Duties : Subject to the provisions of the Government of India Act, the High Commissioner has (1) to act as an agent of the Governor-General in Council in the United Kingdom; (2) to act on behalf of Local Governments in India for such purposes and in such cases as the Governor-General in Council may prescribe; and (3) to conduct such business relating to the Government of India, hitherto conducted by the office of the Secretary of State in Council.

Power to seal: He is empowered to sign, seal and deliver a document. If it is necessary to seal every contract in the name of and for and on behalf of the Secretary of State in Council, he is empowered so to do.

His accounts : He is under an obligation to lay all his accounts of the receipt, expenditure and disposal of all monies, stores and property, accompanied by all necessary papers and vouchers before the auditor appointed by the Secretary of State in Council. He must send a true copy of the report of the auditor to the Governor General in Council.

India House is very recently built to accommodate the offices of the High Commissioner.

159. Indian Statutory Commission's recommendations (Vol. II, Para 361): The Commission hopes that after the Indian Constitution is changed in the light of their recommendations, the position of the High Commissioner will be established on the basis of the High Commissioner for dominions. They make no specific recommendations in this behalf.

160. Fundamental Rights: White Paper: The question of including in the Constitution Act a series of declarations commonly described as statement of "Fundamental Rights" which would be designed to secure either to the community in general or to specified sections of it, rights or immunities to which importance is attached, has been much discussed during the proceedings at the Round Table Conference. His Majesty's Government see serious objections to giving statutory expression to any large range of declarations of this character, but they are satisfied that certain Provisions of this kind such

as, for instance, respect due to personal liberty and rights of property, etc. His Majesty's Government think it probable that in the Royal Proclamation which will be issued while inaugurating the New Constitution Act, a place may be found for such a declaration; (para 75, Introduction.) Sec. 29A

CHAPTER III

THE GOVERNMENT OF INDIA

161. Viceroy and Governor-General : The Head of the Government of India is the Viceroy and Governor-General. The title Viceroy has no statutory basis but the said title was granted in the year 1858 by the Royal Proclamation. The only statutory designation is that of Governor-General; however, in all Government notifications, warrants of precedence, etc., the title Viceroy is used, apparently because the Governor-General is the sole representative of the Crown in India. The office of the Governor-General was first provided for by the Regulation Act of 1773. Gradually, powers of the said office were increased and consequently the superintendence, direction and control of the whole civil and military government were entrusted to the Governor-General. The Governor-General occupies a unique position in the Indian constitution. Mr. Ramsay Macdonald, the Labour Prime Minister, described the Viceroy as "The Crown visible in India, the ceremonial head of the Sovereignty, the Great Lord." He is appointed by the Crown by Warrant under the Royal Sign Manual for a period of five years. He is not subject to the jurisdiction, either civil or criminal, of any High Court in India. He has immense powers, even, under the present Period. 34

He was described by President Lowell as 'as great an autocrat as the Czar of Russia in the modern world.' The events that happened in the years 1930 and 1932 might justify to a certain extent, the statement made by President Lowell. His powers under section 72 are very wide and arbitrary. The powers which cannot be exercised even by the Crown in England, can be exercised by his (constitutional) Agent in India, namely, the Viceroy.

162. Governor-General : Viceroy : Two Distinct Offices: White Paper: The White Paper suggests that there should be two distinct Offices, one of the Governor-General and the other of the Viceroy both to be held by one person but with distinct powers, responsibilities and privileges. The person while executing the rights and powers as a Go-

Sec. verner General will then act as a Governor-General; and while executing the powers, rights and privileges as a Viceroy, he will be known
34 .. a Viceroy.

The office of the Governor-General of the Federation will be constituted by Letters Patent which will set out the powers which the Governor-General will exercise as the King's representative; it is proposed that the King will be pleased to delegate, by that document, some powers to him. He will also receive the Instrument of Instructions from the King and will exercise and perform the powers and duties as he (the King) may thereby direct; (para 10, Introduction).

The same arrangements *mutatis mutandis* are contemplated in the case of the Governor of each Province.

It is intended that the Viceroy shall in future be recognized as holding a separate office which will also be constituted by Letters Patent and the latter will serve as the means of conferring on the Governor-General, in the capacity of Viceroy, the powers of the Crown in relation to the States outside the Federal sphere.

72 **163. The following, in short, are his Statutory powers:** (1) In cases of emergency, he can make and promulgate ordinances for the peace and good government of British India or any part thereof which will have the force of law for a period not exceeding six months.
41 (2) He may over-ride the majority of his Council and act on his own responsibility with regard to any measure whereby the safety, tranquility or interests of British India or of any part thereof, are or may be in his judgment essentially affected. He has similar powers of vetoing
43 any statute passed by any legislature in India. (3) Whenever the Governor General in Council declares it to be expedient that the Governor-General should visit any part of India without his Council, he may be empowered by the former to exercise alone any of the powers of the Governor-General in Council. (4) During his absence from the Executive Council he may issue on his own authority and responsibility any Order which might have been issued by the Governor-General in Council; however, in any such cases, he is bound, forthwith, to send a copy of the Order so issued to the Secretary of State. (5) For other powers see sections 30, 31, 33, 38, 39, 40, 43, 43A, 44, 45, 46, 52A, 53, 55, 57, 59, 60, 63A, 63B, 63C, 63D, 67, 67B, 68, 71, etc.

He is in charge of the Foreign and Political Department which transacts all business connected with external politics, with frontier tribes and with the native states. He also enjoys the powers of Royal

Prerogative except in cases of the major provinces of Bombay, Bengal and Madras. Governors of minor provinces are appointed by the Crown after consultation with him. He can appoint a Deputy Governor to administer a part of a Governor's province *with the approval* of the Crown. He is empowered to appoint Lieutenant-Governors and members of their Executive Councils if necessary. At his discretion, he is also empowered to appoint from amongst members of the Indian Legislative Assembly, Council Secretaries who would hold office during his pleasure and discharge such duties in assisting the members of the Executive Council as he may assign to them.

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164. His duties and responsibilities: With the powers and privileges, the Governor-General has certain duties and obligations. He has to remain in constant and intimate communication with the administrative machinery in the country and with the Secretary of State in England. He is responsible for the discharge of diplomatic business. Constitutionally, he is subordinate to the Secretary of State, and he is responsible to him for the initiative taken by him on his own authority and responsibility.

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165 His special power: He can (1) override his Council, (2) veto any Bill, (3) promulgate Regulations and (4) Ordinances.

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166. Head of Foreign Department: The portfolio of the foreign and political department remains with him under his personal control. He has generally one Secretary called the Foreign and Political Secretary to assist him. This department transacts all business connected with external politics, frontier tribes and Indian States.

167. His prerogative: Under the Instrument of Royal Instructions issued to him at the time of his appointment he enjoys the prerogative of mercy. Clause 5 of the said Instrument runs as follows: "And we do hereby authorise and empower Our said Governor-General in Our name and on Our behalf to grant clemency to any offender convicted in the exercise of its Criminal jurisdiction by any Court of justice within our said territories, .. either full or subject to such lawful conditions as to him may seem fit."

The Crown, by the above delegation of its prerogative, is not fettered in any way and it should be perfectly justified in exercising the said prerogative on the advice of the Imperial Minister.

168. His Position regarding Indian appointments: (a) After consultation with the Viceroy, the Governor of a Province (and not that of a Presidency) is appointed by the Crown; (b) he can appoint a Deputy-Governor; (c) with the approval of the Crown, he can appoint a

- Sec.** Lieutenant-Governor; (d) with such approval, he can appoint members
34 of his Executive Council; and (e) he can appoint Council Secretaries.

169. Whether subordinate to the Secretary of State : Constitutionally and legally, he is subordinate to the Secretary of State; but in actual working of the constitution, much would depend upon their personal relations. By the Instrument of Royal Instructions this subordinate position of his is made clear. The important portion in the said Instrument is as follows: "We have by Warrant under Our Royal Sign Manual constituted and appointed a Governor-General to exercise the Office subject to such instructions and directions as he, or any Governor-General for the time being shall from time to time receive or have received under Our Royal Sign Manual or under the hand of one of Our Principal Secretaries of State.....".

170. Wishes of the People : By the Instrument of Royal Instructions he is required to carry on the Administration of the Central subjects in harmony with the wishes of the people as expressed by their representatives in the Indian Legislature so far as the same will appear to him to be just and reasonable.

- 134** **171. Definition :** The Governor-General in Council is defined as meaning the Governor-General in Executive Council. Similarly, a Governor in Council is defined as meaning the Governor in Executive Council.

- 36** **172. Constitution of Governor-General's Executive Council :** (1) The members of the Governor-General's Executive Council shall be appointed by the Crown by Warrant under the Royal Sign Manual. (2) The number of members of the Council shall be such as the Crown may think fit to appoint. (3) At least three of them must be persons who have served the Crown in India at least for 10 years; and one must be a Barrister or a Pleader of a High Court of not less than 10 years' standing.

At present, there are eight members in the Viceroy's cabinet. The Governor-General is the President of his Council; the eight members are: 1. The Commander-in-Chief, 2. The Finance Member, 3. The Law Member, 4. The Home Member, 5. The Education Member, 6. The Member for Revenue and Agriculture, 7. The Member for Commerce, and 8. The member for Industry. To each of these eight members certain departments are assigned for administration. The foreign department is under the immediate superintendence of the Viceroy. The Viceroy, as a foreign member, has two Secretaries, one Political Secretary dealing with questions of native states, and the other Foreign Secretary dealing with foreign affairs.

173. **Departmental System in the Cabinet:** Sir John Strachy, in 1903, expressed his views regarding the system in the following words: "Although the separation of departments in India is less complete than in England and the authority of a Member in Council much less extensive and exclusive than that of English Secretary of State, the Members of Council are now virtually Cabinet Ministers, each of whom has charge of one of the great departments of the Government. Their ordinary duties are rather those of administrators than those of councillors. The Governor-General regulates the manner in which the public business shall be distributed among them. ...While the Member of the Council takes the place of the English Secretary of State, there is in each department a Secretary holding a position analogous to that of a permanent Under-Secretary in England. It is the duty of these Secretaries to place every case before the Governor-General or Member in charge of his department in a form in which it is ready for decision. He submits with it a statement of his opinion. In minor cases the Member of Council passes orders which are final. If the matter be one of greater importance, he sends on the papers with his own minutes to the Governor-General for approval. If the Governor-General concurs and thinks further discussion unnecessary the orders are issued. If he does not concur he directs that the case shall be brought before the Council, just as in England an important case might come before the Cabinet. The duty rests upon the Secretary apart from his responsibility towards the Member of Council in charge of the department of bringing personally to the knowledge of the Governor-General every matter of special importance. All orders of the Government are issued in the name of the Governor-General in Council."

At Present, the system and the practice are substantially the same.

In actual working, the Members' orders are final, unless they disagree either with the head of the department or with the Local Government; in those cases of disagreement the papers are submitted to the Governor-General and subsequently the orders are passed either by him alone or by the whole Council. In questions of policy, the papers are always submitted to the Governor-General with the opinion of the Member in charge of the portfolio and of all other officers who are otherwise concerned with the same; thereafter, the Governor-General notes his own minutes and orders that the papers may be submitted to the Council. The Council then discusses the question and then orders are issued in the name of the Governor-General in Council.

All the members are appointed by a Warrant under the Royal Sign Manual, *Le.*, they are appointed by the Crown with the advice of the Secretary of State. There is no Diarchy in the Government of India

Sec. 36 and the members are not responsible to the Indian Legislative Assembly. However, owing to non-official majority in the Indian Legislature, the Members of the Council and the Government of India are obliged to keep themselves under *some* restraint.

174. Principle of Appointment of the Cabinet: It must have been noted that the Government of India is not responsible to the Indian Legislature and therefore the principle of responsible government does not exist. That being so, the constitution and the character of the Cabinet are neither based on the principles of the British Cabinet nor on the Cabinets in Dominions. The Government is said to be representative on the ground that the Indian Legislature has now an elected non official majority and therefore at the most a sane Cabinet may be influenced by the vote of the Legislature. All the same, it remains irresponsible to the people of the country.

175. Function and powers of the Government of India: (1) Regarding Central subjects, the Government of India is invested with the powers of administration. (2) Regarding Reserved subjects in the Provinces, the Government of India have powers of superintendence, direction, and control (3) Regarding Transferred subjects, the Government of India's power of intervention is restricted. They can intervene only for the purposes of safe guarding the administration of Central subjects and for deciding disputes between two Provincial Governments.

176. Powers and Control of Governor-General in Council: Subject to the provisions of this Act and Rules made thereunder, the superintendence, direction and control of the civil and military Government of India are invested in the Governor-General in Council, who are required to pay due obedience to all such orders as they may receive from the Secretary of State.

37 **177. Rank and precedence of Commander-in-chief:** The Commander-in-Chief of the Indian Forces shall have rank and precedence in the Imperial Executive Council next to the Governor-General if he is a member of such Council.

38 **178. Vice-president of a council:** The Governor-General shall appoint a member of his Executive Council to be a Vice-President thereof; the Commander-in-Chief is not allowed, by the Statute, to be the vice-president.

39 **179. Meetings:** The Imperial Executive Council shall meet at such place in India as the Governor-General in Council appoints

40, 41 **180. Business of and procedure in the Cabinet:** We have already noted above that the Viceroy acts as President of the Council and a

member thereof is appointed to be its vice-president by the Governor-General. All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council and shall be signed by a Secretary to the Government of India or otherwise as the Governor-General may direct and when so signed shall not be called into question in any legal proceedings on the ground that they were not duly made by the Governor-General in Council. In substance when an order is so issued all Courts of Law are bound to take judicial notice thereof. The Governor-General is empowered to make rules and orders for the more convenient transaction of business in his Executive Council and every order made or act done, in accordance with such rules and orders shall be treated as being the order of the Governor-General in Council.

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If any difference of opinion arises on any question brought before the Council, the Governor-General in Council is ordinarily bound by the opinion and decision of the majority of those present, and, if they are equally divided the president (whoever he may be, whether the Governor-General or any other person presiding) shall have a casting (*i.e.*, a second) vote. But, as hereinabove noted, the Governor-General is empowered to act on his own authority and responsibility to disagree with the majority of his Council, provided in his opinion, the measure proposed is such that either it ought to be adopted or suspended or rejected either in whole or in part, with a view to safeguard peace, tranquility or interests of British India or of any part thereof. In every such case any two members of the dissenting majority may require that the adoption, suspension, or rejection of the measure and fact of their dissent be reported to the Secretary of State, and the report shall be accompanied by copies of the minutes which the members of the Council have recorded on the subject. It must be noted that the Governor-General is not empowered to do anything which he otherwise can not lawfully do with the concurrence of his Council.

181. If the Governor-General is obliged to absent himself from any meeting of the Council, the vice-president or in his absence the senior member (*other than the Commander-in-Chief*) present at the meeting shall preside thereat. Such president, shall have the like powers as the Governor-General would have had, if present, but if the Governor-General is at the time *present* at the place where the meeting is convened, he is required to sign the proceedings if he is not prevented from so signing owing to indisposition, etc., but if he declines or refuses to sign the act, it shall be construed as if the Governor-General was present at the meeting and dissented from the majority at a meeting of

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Sec. 42 the Council, the result being in such cases that the act becomes null and void.

43 We have dealt with the powers of the Governor-General, when he is required to visit any part of India unaccompanied by his Executive Council.

182. Supremacy of Civil Power: It must have been noted that though the *commander-in-chief* ranks in precedence over other members, he is not allowed to preside over the Executive Council in the absence of the Governor-General, on the principle of the *supremacy of Civil power*.

183. The Army Department deals with all questions connected with the administration of the army, the formation and execution of the Government's military policy and the responsibility for maintaining every branch of the army. It has also to deal with the administration of the Royal Indian Marine and the Air Force in India, in so far as questions requiring the orders of the Government of India are concerned. The Commander-in-Chief is both the chief executive officer of the army and the Army Member of the Executive Council. In his administration he is under the authority of the Governor-General.

184. The Home Department deals with all business connected with the general internal administration of British India, e. g., internal politics, Indian Civil Service, law and justice, jails and police. The Home Member plays an important role in the administration. Generally, he is the *leader* of the Assembly. This constitutional convention is abandoned since the days of Sir James Crerar. Sir C. P. Ramswamy Iyer, though an Acting Commerce member, was appointed the *leader*.

185. The Law Member deals with the legislative department. The chief function of this department is to prepare drafts of all bills, introduced into either the Indian Legislative Assembly or the Council of State. The Law Member has to advise the other departments of the Government of India and the Local Governments on questions of Law. This department is required to be consulted before Statutory Rules (i.e., rules having the force of law) are issued.

186. The Department of Railways and Commerce deals with railways, shipping, trade and commerce, tariffs, import and export regulations, statistics, life assurance, etc.

187 The Statutory Railway Board: White Paper: His Majesty's Government Consider it to be essential that, while the Federal Government and Legislature will necessarily exercise a general control

over railway policy, the actual control of the administration of the state railways in India should be placed by the Constitution Act in the hands of a Statutory Body which can function upon the business principles alone. It is also proposed to preserve such existing rights as the Indian Railway Companies possess including the right to have access to the Secretary of State in regard to disputed points, and if they desire to proceed to arbitration. The Statutory Railway Board, therefore, is proposed to be set up on these principles; (para 74, Introduction).

188. The department of Industries and Labour deals with labour legislation, factories, international labour organisation, petroleum and Explosives Acts, patents, designs, steamboiling and electricity, stores, post and telegraphs public works, etc.

189. The department of Education deals with education, land revenue, agriculture, etc.

190. The Finance Member deals with the general administration of central finance and supervision of provincial finance.

191. Nature of responsibility of the Council: The Governor-General and the Executive Council are not responsible to the Indian Legislative Assembly and to the Indian public for their acts of commission and omission. Even if the Indian Legislative Assembly passes a vote of censure against any member of the Executive Council, that member is not bound to tender his resignation. In short, all of them are irresponsible to the Indian nation. The Government of India is responsible only to the Parliament in England. As the said body cannot remain in touch with the affairs of India from a distance of 5,000 miles, it is but natural that it cannot supervise and control the destinies of this country. The reform period has brought about only this much change, (which is insignificant) that the Indian representatives can give vent to their feelings in the Legislature. Consistent and persistent speeches in the Indian Legislature may inform Parliament of the grievances; but it is said, the chance is very remote, and the time has now come that the Executive Government should be made responsible to the Indian Legislature.

Joint Responsibility of the Council: The principle of liability of the Viceroy's Cabinet is somewhat similar to that of the British Cabinet viz., of "united and indivisible responsibility." The Mont-Ford Report lays down very clearly that this principle of united and indivisible responsibility, which guides the Imperial Cabinet, applies equally to administrative and to legislative action. All the members are bound by the opinion of the majority of the Council, unless the dissenting members resign. The policy adopted is the policy of the Government as a

Sec. 43 whole, and as such, must be accepted and promoted by all who decide to continue members of that Government.

Emergency in England : National Government : Joint Responsibility : In August 1931, a very delicate situation arose in England. Labour Party was not there, in clear majority, but commanded the largest number of votes in the House of Commons. The Labour Government was, therefore, in office. England was faced with a financial crisis and it was apprehended that the Labour Government would not be able to tide over the critical situation. The King, therefore, used his benevolent influence and persuaded all the parties—Labour, Conservative and Liberal—to form a National Government (not coalition). This form of government is different both from the party-government and the coalition, there being no precedent in the constitutional and legal history. The Government was obliged to issue a WHITE PAPER explaining why and how the National Government was formed. In the said National Government, Mr. Ramsay Macdonald was asked to accept the office of Premier and Mr. Baldwin (the ex-premier in the ex-Conservative Government) and other leaders of Conservative and Liberal parties were asked to accept other offices.

Each party had conflicting principles and programmes. The Conservatives believed in tariff, whereas the Liberals believed in free trade. In January 1932, differences arose amongst members of the then National (Government) Cabinet on the question of the Tariff Bill. It may be mentioned here, that after the general elections in December 1931, Conservatives were returned to Parliament in a large majority. However, to meet the emergency that had arisen, a National Government was formed on the basis of one that was formed in August 1931. It may be also mentioned that the joint responsibility existed and the Cabinet was jointly responsible for all their Acts. In spite of the existence of this principle, members of the Cabinet decided to tide over the difficulty by resolving "that individual ministers dissenting from the pro-tariff majority, should have the freedom of speech and vote on that issue both in and out of Parliament". Many Conservatives outside the Government held the view that the doctrine of joint responsibility was thereby being gravely undermined, while the Liberals held that the solution was the best way out of a very delicate and difficult situation. It seems the same thing happened on the issue of Ottawa Agreements.

44 **War and Treaties : Restriction on Powers of the Governor-General in Council :** The Governor-General in Council may not, without the express orders of the Secretary of State-in-Council (except where the hostilities have actually begun) either declare war or commence hostilities or enter into any treaty for making war against any

Prince or state in India, or enter into any treaty for guaranteeing the possessions of any Prince or State in India.

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But, he will not be subject to this restriction, when hostilities have been actually commenced or preparation for their commencement have actually been made against the British Government or against any Prince.

The Governor-General in Council shall forthwith communicate the same with the reasons thereof to the Secretary of State, if he is obliged to commence any hostility or make any treaty.

193 The Control Exercised by the Government of India over Local Governments: The unitary system of the Government is not altered inspite of the devolution of powers under the Mont-Ford Reforms. The attention of the readers is invited to the provisions of section 33 and 45 of this Act. The Government of India Act and the Rules made thereunder have provided for the classification of functions of the Government, as Central and Provincial, and for the division of the provincial subjects into Reserved and Transferred. The Central subjects are under the direct administrative control of the Government of India and subject to legislation by the Legislature. It is already pointed out that the Government of India is responsible to the Secretary of State, who, in his own turn, is responsible to Parliament for the administration of the Central subjects. The Provincial subjects are under the control of the Provincial Government and subject to legislation by the respective Legislative Councils, except in case where a contrary provision is made in the Act and in the Rules made thereunder. Some of the provincial subjects are subject to legislation by the Indian Legislature.

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194. Aden: By an Imperial Act, 20 Geo. V, ch. 2, the Government of India (Aden) Act, 1929, ss. 33 and 45 of the Government of India Act were amended; and the Military Government of Aden was placed directly under the superintendence of the Government of India.

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Efforts are being made to separate Aden from India and to place it under the administration of the Colonial Office.

195. Nature of the present Control: Sec. 33 lays down: "Subject to the provision of this Act and Rules made thereunder, the superintendence, direction and control of the Civil and Military Government of India is vested in the Governor-General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State."

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196. Its Relation to Local Governments: Subject to the provision of this Act and Rules made thereunder, every Local Government shall

Sec. 45 obey the orders of the Governor-General in Council and keep him constantly and diligently informed of its proceedings and of all matters which ought, in its opinion, to be reported to him, or as to which he requires information; the Local Government is under the superintendence, direction and control of the Government of India, in all matters relating to the government of its province.

197. Control over Transferred Subjects: Except in certain cases, which have been discussed before, the Government of India have no control over the transferred subjects. The nature of such control is (1) to safeguard the administration of Central subjects; (2) to decide questions arising between two provinces in case where the provinces concerned fail to arrive at an agreement; and (3) to safeguard the due exercise and performance of any powers and duties possessed by or imposed on the Governor-General in Council under or in connection with, or for the purpose of the following provisions of that Act, viz., sec. 29 (A), 30 (1A), the Part 7th A, or of any Rules made by or with the sanction of the Secretary of State in Council.

It is true that the assent of the Governor-General is required to validate a Provincial Act, whether relating to the Reserved or the Transferred subjects, and, therefore, it may be said that he has, in theory, control over provincial legislation by the exercise of that right; it would, however, not be possible for the Governor-General to refuse his assent to any Provincial Act which has already received the assent of the Governor of the province; such a refusal may precipitate a grave crisis.

Sir John Simon described this procedure of obtaining the assent, before and after the Bill is introduced and passed, as ingenious.

198. Control over Reserved Subjects: The Provincial Governments are responsible to the Government of India for the administration of the Reserved subjects. The Majority Report of the Joint Select Committee stated: "We recognize that in so far as the provincial governments of the future will still remain partly bureaucratic in character, there can be no logical reason for releasing the control of the superior official authority over them, nor indeed would a general relaxation be approved by Indian opinion; and that in this respect the utmost that can be justified is such modification of present methods of control as aims at getting rid of interference in minor matters which might very well be left to the decision of the authority which is closely acquainted with the facts." By the Instrument of Royal Instructions issued to the Governor-General the following directions are given to the Governor-General: "In particular it is Our will and pleasure that the powers of superintendence, direction and control over the said Local Governments vested in our said Governor-General.....shall, unless

grave reason to the contrary appears, be exercised with a view to furthering the policy of the Local Governments of all Our Governors' provinces, when such policy finds favour with a majority of members of the Legislative Council of the province."

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We do not know how far these Royal recommendations are carried out in practice. If the reports are to be trusted, the recommendations are more honoured in breach than in observance.

Duty of Local Government: Devolution Rule 5 requires every Local Government to submit to the Governor-General in Council from time to time all information relating to the Administration of provincial subjects as required by the Governor-General in Council

200. Powers regarding boundaries of provinces: The Governor General in Council may by notification declare, appoint or alter the boundaries of any of the province into which British India is for the time being divided, and distribute the territories of India among the several provinces thereof in such manner as may seem expedient except in the following cases, *viz.*, (1) an entire district may not be transferred from one province to another without the previous sanction of the Crown signed by the Secretary of State in Council; (2) any such notification may be disallowed by the Secretary of State.

The Recommendations of the Indian Statutory Commission Regarding The Government of India

201. Position of the Governor-General: (Vol. II, para 167): In the opinion of the Indian Statutory Commission, the Governor-General must continue to be not only the representative of the King-Emperor in all formal and ceremonial matters, but also the actual and active head of the Government. They do not desire the range and importance of his present functions be narrowed to any extent. The Commissioners require him to assume the responsibility which is at present constitutionally discharged by the Governor-General in Council with reference to the provincial executive. They opine that the influence, advice and discretion of the Viceroy for the time being will certainly be needed for many years to come if the constitutional progress of India is to be successfully promoted.

202. He to Choose his Executive Council: (Vol. II, para 168.) "One change which we think should now be made is to place upon the Governor-General himself the responsibility of selecting and appointing the members of his Cabinet. At present, members of the Governor-General's Executive Council are appointed under the advice of the Secretary of State by Warrant under the Royal Sign Manual and the Secretary of State in making these recommendations is of course largely guided by the Governor-General's advice."

Sec. 203. Whether the Change Desirable: One fails to understand the principle on which the aforesaid recommendations are made. The ostensible grounds seem to be that because in actual working the *Governor-General* proposes the names of appointees he should be empowered to make the appointments himself. The Premier is entitled to name his own colleagues; if on the same principle, the Viceroy is empowered to choose his own colleagues there is no proper analogy. The Premier and his colleagues are responsible to Parliament, whereas the Viceroy and his colleagues are not responsible to the Legislature. When the grounds given in the recommendations are closely examined, one is obliged to come to the conclusion that they are both unsound in theory and in practice. If there is either an autocratic or a weak Viceroy, he will generally, appoint members of reactionary views. If there is a really goodminded and strong Viceroy and if he appoints men of his views, there will otherwise be a great difficulty. According to reports, all schools of thought have expressed an opinion against this proposal.

204. Executive Council: (Vol. II, para 169.) They recommend amendment of sec 36 which provides that at least 3 members of the Council must be persons who have been for at least 10 years in the service of the Crown in India. By no means they are disposed to suggest that the time has come to dispense with this provision. They desire to have a statutory rule framed instead of having a statutory provision in the Act, so that there may not be any necessity to call upon Parliament to amend the Act.

205. The Commander-in-Chief: (Vol. II, Para 170): They desire that the Commander-in-Chief should cease either to be a member of the Executive Council or the Legislature. They desire to place the subject of the defence of India in the hands of the Viceroy himself, who may act in closest collaboration with the Commander-in-Chief. He should himself retain his present rank and precedence. The Army Secretary may be appointed but the leader of the Legislature may be called upon to deal with important questions raised in the Legislature.

206 Military and Politics: During the 'course of Martial Law regime in Sholapur, a military officer (at Poona) had indulged in politics. General Sir Phillip Chetwode, the then Commander-in-chief-designate of India is reported to have spoken at the British Legion in England as follows: "If we kept a firm hand in India and did what we should do, there was no danger whatever.....The British should either show that what they intended to do was right or chuck it; otherwise, there was a risk of disloyalty among Indian troops and police.....".

On this speech, Mr. Wedgwood Benn, the then Secretary of State, was, on July 24th, 1930, questioned by various members in the House of Commons. On being asked whether in view of his utterances Sir Philip Chetwode would be sent to India as the Commander-in-Chief, Mr. Benn said: "Sir Phillip is not at present on the Indian establishment.....Questions of policy are decided by his Majesty's Government and the Governor-General in Council, to whose superintendence, direction and control Sir Philip, when he takes up his position as Commander-in-Chief, will become subject. The Policy which it is contended to pursue in India is a policy authoritatively stated by the Viceroy on July 9th Questions of policy have nothing to do with soldiers. They are settled by Civil Government".

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The statement of Mr. Benn settles the constitutional issue that soldiers cannot meddle in politics, because the Civil Government is supreme and soldiers have merely to obey their orders.

207. Leader of the Legislature : (Vol. II, para 171.) They recommend that a separate member may be appointed whose duty it may be "to lead the House". They desire to relieve Home Member of this onerous duty in view of his other wide and multifarious responsibilities. The convention, that a Home member should generally, *lead* is not followed since the time of Sir James Crerar. The question is discussed on page 82 *ante*.

208. Whether the proposal desirable ? : In England, the Premier is the Leader of the House. It cannot be denied that the range and burden of multifarious responsibilities of the Premier are wider and greater than those of the Home Member. In spite of this fact the Premier *leads* the House. One, therefore, fails to understand why this additional burden is recommended. The grounds stated in the Report cannot justify the recommendation.

209. To appoint elected Members as Councillors : (Vol. II, Para 173) They make a proposal which would be described as unsound in principle. They recommend one or more elected members in the Indian Legislature to be appointed as members of the Executive Council. The Government on various occasions laid temptations by appointing Ministers of Local Governments either as Executive-Councillors or as Members of the India Council. The public has constantly opposed this principle on the ground that Ministers and such other officers would, under those circumstances, look to higher promotions and be consequently subject to the orders of the Executive. On the same principle, it will be highly undesirable to draw Executive Councillors from the Assembly unless the Ministers so appointed are made responsible to the Legislature.

Sec. 210. Irresponsible : They express the opinion that the Executive Council in the next stage cannot be made responsible to the Indian Legislature.

211. Proposals made by the Federal Structure Committee at the Indian Round Table Conference : At the end of the first Chapter of this Part we have referred to the Indian Round Table Conference and the various Committees appointed by the said Conference. One of the important Committees was the Federal Structure Committee to which the following points were referred: *viz.*, (1) the component elements of Federation (2) the type of the Federal Legislature and members of Chambers of which it should consist, (3) the powers of the Federal Legislature and (4) the constitution, character, powers and responsibilities of the Federal Executive Council.

At the Plenary Session of the Round Table Conference it was resolved that the future Government of India shall be on the basis of Federal Constitution, the component parts being the various Provinces of British India and the various Native States.

The said Committee submitted their *interim* report to the Conference held on the 16th December, 1930. On the first point referred to them, *viz.*, component elements of Federation, they reported that the component elements should be on the one hand the federating provinces of British India and on the other hand such Indian States or groups of States as may enter the Federation.

Regarding the second point, *viz.*, the type of Federal Legislature, the said Committee submitted their recommendations as follows: (1) the Federal Legislature should consist of two Chambers, each containing representatives of both British India and the States (2) The method whereby the representatives of the States should be chosen must be a matter left to the State themselves. (3) Differences within the two Chambers might be determined either at the joint session or by any such other means.

Regarding the third point, *viz.*, the powers of the Federal Legislature, their recommendation was as follows: They submitted a Provincial list of Federal subjects on the assumption that the Federal Legislature will be clothed with the powers to legislate upon all subjects included in it. They did not include the subjects like External Affairs, as in their opinion they raised the question of relations between the Executive in India and the Crown.

Regarding the fourth point, *viz.*, the constitution, character, powers and responsibilities of the Federal Executive, their recommendations

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are as follows : The responsibility for the Federal Government of India must in future rest upon the Indians themselves, i.e., they recommended a form of Responsible Government. (Note : It seems that while making these recommendations they were relying upon precedents as laid down in sections 9 to 11 of the British North America, (i.e., Canada) Act, 1867 ; sections 8 & 9 of the Union of South Africa Act, 1908, and sections 61 and 62 of the Commonwealth of Australia Constitution Act, 1909). They recommended also the principle of joint responsibility of the Cabinet, pointedly drawing attention to the established Parliamentary practice and convention prevailing in the United Kingdom and throughout the British Commonwealth. They further recommended some safeguards during the transitional period. So much for the Transferred subjects. They recommended defence and some external affairs, as Reserved subjects, with reference to which, they recommended some *Advisors* to be appointed to assist the Governor-General. They, in effect, recommend diarchical form of Government at the Centre. In the event of the situation unhappily arising in making the constitution unworkable, adequate powers were recommended to be vested in the Governor-General for the purpose of enabling the King's Government to be carried on.

The said Committee has made certain recommendations regarding the Legislature, its structure and composition. Very recently His Majesty's Government have published their decision regarding the Provincial Legislatures, but they have differed to arrive at any conclusion with regard to structure and composition of the Central Legislature; and therefore, we feel that it is useless to deal with the recommendations of the said Committee in that behalf.

212. Nature of the Federal Constitution : It seems that the future Government of India will be based on federalism. It is necessary for that purpose to consider several federal constitutions of the World. They are discussed in the second Part of this treatise. The requisites and incidents of such a constitution are also discussed in the second Part as well as under Chapter VII of this Part. We have also discussed the main characteristics featuring in each of the said seven constitutions, in Chapter VII. The attention of the reader is therefore particularly invited to the said discussions while studying the recommendations of the Federal Structure Committee, and the proposals made in the White Paper.

Proposals in the White Paper regarding the Federation and the Federal Government, Replacing the present Government of India.

213. The conception of a Federation of States and Provinces, and the process involved in its formation necessitates a complete reconstruc-

Sec. tion of the existing Indian Constitution. The existing Government of **W.P.** India Act will be repealed *in toto* and will be replaced by the Act described in the White Paper as the Constitution Act. (Para 5, Introduction.)

214. Basis of Federation : Principle : Federation elsewhere has usually resulted from a pact entered into by a number of political units, each possessed of sovereignty or at least of autonomy, and each agreeing to surrender to the new central organism, which their pact creates, an identical range of powers and jurisdiction, to be exercised by it on their behalf to the same extent for each one of them individually and for the federation as a whole. India, however, has little in common with historical precedents of this kind. In the first place, British India is a unitary state, the administrative control of which is by law centered in the Secretary of State in some respects in a statutory corporation known as the Secretary of State in Council—in whom are vested powers of control over “all acts, operations and concerns which relate to the Government or revenues of India.”

215. Indian Native States and Federation : The States on the other hand, though they are under the suzerainty of the King-Emperor form no part of His Majesty's dominions, Parliament cannot legislate directly for their territories, yet all rights, authority and jurisdiction possessed in India, including those derived from treaty, grant, usage, sufferance or otherwise in relation to other territories, are vested in the Crown and are exercisable by and in the name of King-Emperor. However, the range of authority to be conferred upon the Federal Government and Legislature in relation to the States must be determined by agreement with their Rulers. To meet the situation, it is proposed to set up a Federal Legislature consisting of elected representatives of Indian States to be appointed by the Rulers, and a Federal Executive consisting of the Governor-General representing the Crown, aided and advised by a Council of Ministers, who would be responsible only regarding the Federal subjects. Full liberty will, of course, be reserved to the Crown to refuse to accept the accession of any State to the Federation, if it is so sought on terms incompatible with the scheme of Federation embodied in the Constitution Act. (Paras 5 to 8, Introduction ; para 1, Proposals.)

216. Form of the proposed Federation : The Federation of India will be a union between the Governors' provinces and those Indian States whose Rulers signify their desire to accede to the Federation by a formal Instrument of Accession. By this instrument, the Ruler will transfer to the Crown for the purposes of the Federation his powers and

jurisdiction in respect of those matters, which he is willing to recognize as Federal matters, which will be administered and governed by the Federal Executive and the Federal Legislature in accordance with the provisions of the Constitution Act. Sec. W.P.

217. Anomaly: The authors of the White Paper themselves admit that the proper basis for the formation of Federation as conceived in the White Paper, does not exist. If all powers are to vest in the Crown and if both the Governor-General and the Governors are to represent the King as Executive heads, the real legal and constitutional basis for the formation of Federation does not exist. The guiding principle has been well propounded in the White Paper and on proper scrutiny of the proposed formation of the Federation, one cannot find the observance of that principle. The position will, therefore, be legally and constitutionally anomalous. If the proposed provincial units are also made independent, at least to the extent the Indian States are, a Federation, in the real legal and constitutional sense of the word, is feasible. The consequences which will arise by the Instrument of Accession may, also, be noted. On the State-members agreeing to transfer their power of administration over the Federal subjects to the Federal Government, the Crown will be seized of the ultimate responsibilities for the proper administration of those subjects according to the proposed Constitution. The proposals will create a peculiar position; and therefore, the term Federation shall have to be understood differently and distinctly from what it has been so far defined and cannoted, both legally and constitutionally.

218. Instrument of Accession: It has been observed in the foregoing paras that for the purposes of Federation, State-Members will forego their rights with reference to the administration of the Federal subjects. Such abandonment of their rights in favour of the Federal Government will be embodied in a document known as an Instrument of Accession which will play an important role in the future Federal Government and will be one of the important Constitutional Documents. It is proposed to set up a Federal Court and perhaps an occasion will arise for such Federal Court to interpret the various Instruments of Accession executed by various State-Members.

219. Right to secede from Federation: In para 215, it has been observed that the Crown reserves the right to refuse to admit any State in the Federation. The States, therefore, propose to claim a right to secede from the Federation. At the Joint Parliamentary Committee, Sir Manubhai Mehta on behalf of the Princes formulated such a right. According to him, the right of secession had been the *sine qua non* of the Indian States in regard to Federation. The Princes would

Sec. be entering the Federation by a treaty of accession, otherwise known as
W.P. the Instrument of Accession, and would, therefore, be transferring certain portion of their internal Sovereignty to the Crown in order that the latter might delegate those powers to the Federal Government". "The Crown had power to protect them and if their interests were not being properly safeguarded, they should be entitled to ask the paramount power to relieve them of their Federal obligations." Sir Manubhai claimed, under the circumstances, "that the new treaties of accession are expected to be bilateral in character." The Princes, therefore, must have the "right to revise the said treaties and claim secession if the other party was not carrying out its own obligations and encroaching upon the rights of the Princes". Naturally, the Princes would be anxious according to him, to see that their rights were not either systematically or otherwise jeopardized.

220. Viceroy and Indian Native States: It has been already observed that one person will hold two distinct and separate offices of Governor-General and Viceroy. When the holder of that office will have to deal with Indian States to the extent to which the Rulers have not transferred powers and jurisdiction, he will be called Viceroy. So also, when he has to deal with Indian States who have not at all transferred their powers and jurisdiction, he will be acting as the holder of the office of Viceroy, who will be representing the Crown. Accordingly, all powers of the Crown in relation to the States which are at present exercised by the Governor-General in Council, other than those, which fall within the Federal sphere will, after Federation, be exercised by the Viceroy as the Crown's representative; (para 3, Proposals).

The Governor-General shall not have any special powers *vis-a-vis* the States in relation to the matters arising in the Federal sphere proper. (Para 28, Introduction.)

221. Royal Proclamation: The Federation will be brought into existence by the issue of a Proclamation by His Majesty. (Para 4, proposals.) This Proclamation will also be one of the important Constitutional Documents, the others being Letters Patent, Instrument of Instructions issued to the Governor-General and the Governors and the Instruments of Accession.

222. Federal Executive: The Executive power and authority of the Federation will be vested in the King and will be exercised by the Governor-General as his representative, aided and advised by a Council of Ministers responsible to a Legislature, containing representatives both of British India and of the States. The supreme command of the

Military, Naval and Air Forces will be vested in him. He will hold office during His Majesty's pleasure. All Executive Acts will run in the name of the Governor-General. Sec. W.P.

The Ministers referred to in the foregoing paras will not have the power to aid and advise the Governor-General in matters pertaining to departments concerned with the Defence, External Affairs and Ecclesiastical Administration, which will be entrusted to the Governor-General personally and for these matters he will be responsible to His Majesty's Government and Parliament. The Governor-General will not also be bound to consult his Ministers with reference to the matters regarding which special responsibilities of the Governor-General are created. Provision will also be made enabling the Governor-General to disregard their advice, if in his judgment such advice be inconsistent with the fulfilment of any purposes for which he will be declared to be charged with "special responsibilities," in which case the Governor-General will act notwithstanding the advice tendered to him, in such a manner as he deems requisite for the discharge of those special responsibilities." (Para 14, Introduction; Para 6, Proposals.)

223. Sources of Powers: The sources of powers of the Governor-General will be the (1) Constitution Act, (2) Letters Patent, (3) Instrument of Instructions and (4) Instrument of Accession. (Para 8, Proposals.)

224. Bodies that will play a role in the Administration: The King, His Majesty in Council, His Majesty's Government, the Governor-General and Governors in discharge of their special responsibilities and the Federal Executive will be the various bodies playing a distinct and an important role in the administration of the proposed Federation of India.

225. Governor-General and Reserved Departments: For the purpose of assisting in the administration of the Reserved Departments the Governor-General will be empowered to appoint at his discretion not more than three Councillors whose salaries and conditions of service will be prescribed by His Majesty in Council. The Governor-General will be entitled to choose such Counsellors, without any restriction and from wherever he may find suitable persons.

This suggests that the Viceroy will be able to choose even English politicians as his Counsellors.

Such Counsellors will be *ex-officio* members of both the Chambers of the Federal Legislatures, but without a right to vote.

226. Note: The various provisions regarding the special responsibilities of the Governor-General can, strictly, be said repugnant to

Sec. W.P. the well established constitutional principles of Responsible Government. The proposals also incorporate Diarchy in another form. The present objections to the said form of Government will also apply to the proposed form.

227. The working of the Federal Executive : The system of portfolio will continue as at present.

228. (Federal) Reserved Subjects : The Governor-General will himself direct and control the administration of certain departments of state, viz. Defence, External Affairs and Ecclesiastical Affairs. In the administration of these Reserved Departments, the Governor-General will be assisted by not more than three Counsellors who will be appointed by the Governor-General, and whose salaries and conditions of service will be prescribed by Orders in Council. (Paras 11 & 12, Proposals.)

229. (Federal) Transferred Subjects : For the purpose of aiding and advising the Governor-General in the exercise of powers conferred upon him by the Constitution Act for the Government of the Federation, other than the powers connected with the matters mentioned in para one (of the Proposals), and matters left by law to his discretion, there will be a Council of Ministers, who will be chosen and summoned by the Governor-General and will hold office during his pleasure. The persons so appointed must be, or become within a stated period, members of one or the other chamber of the Federal Legislature.

230. Appointment of Ministers: Constitutional Convention: In his Instrument of Instructions the Governor-General will be enjoined, *inter alia*, to use his best endeavours to select his Ministers in consultation with the person, who in his judgment, is likely to command the largest following in the Legislature, and to appoint those persons (including members of minority communities and representatives of State-members, who will best be in a position collectively to command the confidence of the Legislature. Their salaries will be regulated by the Act of the Federal Legislature. (Paras 14 & 15, Proposals.)

231. President of the Ministry: Contrary to the principles of Responsible Government and the Constitutional Convention, the chief Minister will not be the President of the Ministry or the Cabinet. The Governor-General will, whenever he thinks fit, preside at meetings of his Council of Ministers. In consultation with them, he will frame Rules to regulate the disposal and procedure of the Government business both of the Reserved and Transferred Departments. (Para 16, Proposals.)

232. Finance Department and Financial Adviser: The Finance Department is not specifically made a Reserved Department, but the

Governor-General has been charged with special responsibilities for the new administration of the Finance Department. The provision is, therefore, proposed to be made to appoint after consultation with his Ministers, a Financial Adviser to assist him in discharge of his special responsibilities in that behalf. He will hold office during Governor-General's pleasure and his salary will not be subject to the vote of the Legislature. Sec. W.P.

233. Various kinds of responsibilities of the Governor-General and Viceroy : Governor-General and Viceroy is charged with various kind of responsibilities, viz., exclusive responsibility with reference to the administration of the Reserved Departments, (2) Special Responsibilities mentioned in para 18 (of the Proposals) and (3) the Ordinary Responsibilities regarding the administrative departments of the Transferred subjects.

234 The Governor-General and special Responsibility : The Governor-General will have full discretion to act as he thinks fit in discharge of his special responsibilities but in so acting he will be guided by any direction which may be contained in his Instruments of Instructions or in any other Constitutional Document. (Para 19, Proposals.) The "special responsibilities" of the Governor-General are almost identical with such responsibilities of the Governor. This subject is discussed in para 222 *post*.

235. The Governor-General and exclusive responsibilities , The Governor-General will act in discharge of his exclusive responsibilities in administering the Reserved departments under his own directions and control and he will act as he thinks fit. But in so acting he will be guided by any discretion vested in him by the Constitution Act and in accordance with such directions if any, not being inconsistent with anything in his Instruments of Instructions as may be given by a principal Secretary of State.

236. Instruments of Instructions : As observed before, an Instrument of Instructions will play an important role in future. It is proposed, therefore, to include the following clauses in the said document :
' In matters arising in the Departments which you direct and control on your own responsibility, or in matters the determination of which is by law committed to your discretion, it is Our will and pleasure that you should act in exercise of the powers by law conferred upon you in such manner as you may judge right and expedient for the good government of the Federation, subject, however, to such directions as you may from time to time receive from one of Our principal Secretaries of State.'

Sec. "In matters arising out of the exercise of powers conferred upon you
W.P. for the purposes of the government of the Federation other than those specified in the preceding paragraph it is Our will and pleasure that you should in the exercise of the powers by law conferred upon you, be guided by the advice of your Ministers, unless so to be guided would, in your judgment, be inconsistent with fulfilment of your special responsibility for any of the matters in respect of which a special responsibility is by law committed to you; in which case, it is Our will and pleasure that you should, notwithstanding your Ministers' advice, act in exercise of the powers by law conferred upon you in such manner as you judge requisite for the fulfilment of your special responsibilities, subject, however, to such directions as you may from time to time receive from one of our principal Secretaries of State."

237. Validity of Instrument of Instructions: It has been contended that the Instrument of Instructions as contemplated will be void as against and *ultra vires* of the Constitution Act. At the meeting of the Joint Parliamentary Committee, in July 1933, Lord Reading contended that it was the prerogative of the Crown to issue Letters of Instructions on the advice of a principal Minister responsible to Parliament. If therefore anything was done contrary to such prerogative or to any Act of Parliament, the Letters of Instructions would be void and *ultra vires*. Lord Sankey, the Lord Chancellor, agreed with the view of Lord Reading. Sir Samuel Hoare, the Secretary of State for India, promised to consider the legal and constitutional questions raised and would see that the proposed Instrument of Instructions would neither infringe any Constitutional prerogative of the Crown nor any Act of Parliament.

238. Governor-General's Relations with his Ministers: Reserved Departments: Although the Reserved Departments will be administered by the Governor-General on his sole responsibility, it would be impossible in practice for the Governor-General to conduct the affairs of these departments in isolation from the other activities of his Government, and undesirable that he should attempt to do so, even if it were in fact possible. A prudent Governor-General would, therefore, keep his ministers and advisors in the closest contact; he would, therefore, so arrange the conduct of executive business that he himself, his Counsellors and his responsible Ministers, are given the fullest opportunity of mutual consultation and discussion of all matters which call for co-ordination of policy. His Majesty's Government intend to secure the embodiment of this principle in appropriate terms in the Governor-General's Instrument of Instructions. They propose to insert a clause therein to the following effect: ".....you shall encourage joint deliberations between yourself, your Counsellors, your Ministers,

and in particular you shall make it your endeavour to secure that the views of your Ministers in relation to Defence expenditure shall be ascertained and duly weighed.....". (Para 23, Introduction.) Sec. W.P.

239. Note : It may be noted that such a recommendation was made in the Mont-Ford Reforms regarding the Diarchy that was introduced in Provincial Governments. The working of the Diarchy and our experience in that behalf have shown how far the recommendations were carried out. The observations made on the Diarchy and its working in the Chapter on the Provincial Government may also be noted here.

240. His Relations with Ministers : Transferred Departments : In the matter of Transferred Departments, i.e., the Departments the administration whereof is transferred to the Ministers responsible to the Legislature, the Ministers will have a constitutional right to tender advice to the Governor-General, who will, except to the extent and in the circumstances explained below, be guided by that advice.

241. Exception: Wherever the Governor-General is charged with a special responsibility, he will be entitled to act on his own judgment, if he feels that the advice tendered by his Ministers is contrary to or inconsistent with such special responsibility. (Paras 23, 24, 25, 26 and 27, Introduction.)

242. Governor General's Relation with the Legislature will be considered while discussing the Proposals regarding the Federal Legislature. (Paras 34 to 38 and 41, Introduction.)

243. His discretionary powers will, also, be considered while discussing the proposed Federal Legislature. (Para 33, Introduction.)

244. Administrative Relations between the Federal Government and the Units will be considered while discussing the proposed Provincial Government.

245. Relation with the State-Members of the Federation: It will be the duty of the Ruler of a State to secure that due effect is given within his territory to every Act of the Federal Legislature applicable to that territory. The Governor-General will be empowered and required to see that due effect is given ; and in that behalf he will be entitled, by inspection or otherwise, to satisfy himself that an adequate standard of administration is maintained. Similarly, he will be empowered to ensure the successful fulfilling of the Federal obligations of the State. (Paras 127, 128, 129, Proposals.)

246. Summary : It is perhaps desirable to summarise very briefly the effect of the Proposals. The Governor-General will be the repre-

Sec. representative of the Crown in whom the Government will be vested. The **W.P.** responsibilities to be imposed on the Governor-General by the Constitution will be of two kinds—exclusive responsibility for the administration of the Reserved Departments and a special responsibility for certain defined purposes outside the range of the Reserved Departments. Regarding the Reserved Departments, Ministers will have no constitutional right to tender advice, nor will they be so empowered where the Governor-General has to act on his own discretion.

247. Proposals regarding Finance, 'Governor-General's Act' and 'Ordinance' will be discussed in the Chapter on Indian Legislature

248. Break-down of Constitution : The proposals indicated above have no reference to situations where a complete break-down of the Constitutional machinery has occurred. It is the intention of His Majesty's Government that the constitutions should contain separate provision to meet such situations, should they unfortunately occur either in the Province or in the Federation as a whole, whereby the Governor-General or the Governor, as the case may be, will be given plenary authority to assume all powers that he deems necessary for the purpose of carrying on the King's Government.

If the principle underlying these provisions is scrutinised, one has to conclude that neither the proposed constitution is Federal nor is it autonomous. It may, at the most, amount to 'Monarchy with (certain specified) delegated powers.' If the conveyancing language can be made applicable, the proposed constitution can be described as partial "responsible government at will." (Para 44, Introduction.)

CHAPTER IV

PROVINCIAL GOVERNMENTS

134 249. Definition of Local Government : Local Government means in case of a Governor's Province, Governor in Council or the Governor acting with Ministers (as the case may require), and in the case of a province other than a Governor's province, Lieutenant-Governor in Council, Lieutenant-Governor or Chief Commissioner. It also means a person authorised by law to administer executive government in the part of British India in which the Act containing the expression operates and to include a Chief-Commissioner.

For the purpose of administration, British India has been divided into 15 provinces, each having its own Local Government. They are

divided again into major provinces and minor provinces. Some of the major provinces are known as Presidencies. Governors of Presidencies are appointed by the Crown by a Warrant under the Royal Sign Manual. The minor provinces are again divided into two parts—one part having a Governor, who is appointed by a Warrant under the Royal Sign Manual but after consultation with the Governor-General, and the other part having a Chief-Commissioner.

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250. Presidencies, major and minor Provinces : The Presidencies of (1) Bengal, (2) Bombay and (3) Madras have Governors. The following minor provinces also have Governors : (4) The U. P., (5) The Punjab, (6) The C. P., (7) Bihar and Orissa, (8) Assam, (9) Burma, and (10) The N. W. Frontier Provinces. Governors of these provinces are appointed by the Crown after consultation with the Governor-General, as stated before. Governors of these minor provinces are generally members of the L. C. S. Governors of the major provinces of Bombay, Bengal, and Madras are usually English statesmen sent from England.

The remaining provinces are : (11) British Baluchistan, (12) Delhi, (13) Ajmer-Merwara, (14) Coorg, and (15) The Andaman and Nikobar Islands. These provinces have a Chief-Commissioner.

This distinction is sought to be repealed by the White Paper.

251. Duties and relations of Provincial Governments : Subject to the provisions of this Act and Rules made thereunder, every Local Government shall obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of their proceedings and of all matters which ought, in their opinion, to be reported to him, or as to which he requires information and are under his superintendence, direction and control and all matters relating to the government of their province.

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The obligation of the Local Government does not cease even if the Governor-General happens to be personally present in their province.

Broadly speaking, there are two kinds of duties of a Provincial Government: (1) The administration of Provincial subjects—Transferred subjects on autonomous lines and Reserved subjects on unautonomous lines—under the direct control of the Government of India as hereinbefore stated. (2) The performance of agency work for and on behalf of the Government of India regarding Central subjects as required by the Devolution Rule 46.

Administrative relation between the Federal Government and the

Sec. Units as proposed in the White Paper are considered at the end of
45 this Chapter.

252. Agency work: We have hereinbefore stated that the Local Government is required to carry out the agency work under the Devolution Rule 46. The cost of an establishment exclusively employed by the Local Government for the purpose of carrying out such agency work is to be borne by the Central Government. If the Local Government does not require such exclusive establishment, and carries out the agency work jointly with its own work, part of the cost of such establishment may be borne by the Government of India.

253. Governor's Province: "We propose, therefore, that in each province the Executive Government should consist of two parts, one part would comprise the head of the province and an Executive Council. In all provinces, the head of the Government would be known as Governor. The Governor in Council would have charge of the Reserved subjects." These were the remarks of the Joint Report. With reference to the other half the Joint Report's recommendations were that the Governor should have such number of ministers to be chosen from elected members of the Legislative Council according to the number and importance of the Transferred subjects. They would be members of the Executive Government but not members of the Executive Council. This, in brief, is the history of the partition of the domain of the Provincial Government into two fields, one of which remained irresponsible and the other became somewhat popular or responsible to the legislature.

There is some difference between a Presidency and a Province. We have already noted the difference in the appointment of Governors. Moreover, the Presidency Governors have privilege of direct correspondence with the Secretary of State for India and have a right to appeal to him against the orders of the Government of India. If a vacancy occurs in the office of the Viceroy and if the Viceroy-designate is not in India to take over charge, the Governor of a presidency who was first appointed to the office of the Governor has a right to hold and execute the office of the Viceroy until the successor arrives. There is also a *difference in salaries* of such Governors. Governors of Bombay, Bengal, Madras and U. P. are each entitled to the maximum salary of Rs. 1,28,000 per annum; those of the Punjab and Bihar and Orissa to Rs. 1,00,000 per annum; those of the C. P. and Assam to Rs. 72,000 and Rs. 66,000 per annum respectively.

254. Partition of Provincial Governments into two heads: The memorable announcement of August 20th, 1917, followed by various events, brought about the division of Provincial Governments into two

halves. Under the Mont-Ford Report, the recommendations were made in the following terms: "The provinces are the domain in which the earlier steps towards progressive realisation of responsible government should be taken. Some measure of responsibility should be given at once and our aim is to give *complete responsibility* as soon as conditions permit. This involves at once giving the provinces the largest measure of independence, legislative, administrative and financial, of the Government of India; which is compatible with a true discharge by the latter of its own responsibilities We do not believe that there is any way of satisfying these governing conditions, other than by making a division of the function of the Provincial Governments which may be made over to popular control and those which for the present must remain in official hands We may call these the *Transferred* and *Reserved* subjects respectively We propose therefore that in each Province the Executive Government should consist of two parts. One part would comprise of the head of the Province and an Executive Council of two members one of the two Executive Councillors would in practice be a European qualified by experience and the other would be an Indian. The Governor in Council would have the charge of the Reserved subjects The other part would consist of one member or more than one member chosen by the Governor from the elected members of the Legislative Council. They will be known as Ministers. They would be members of the Executive Government but not the members of the Executive Council."

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255. Duties and responsibilities of a Governor: The Governor of a province has almost the same duties and responsibilities in respect of his province as the Viceroy generally has. By the instrument of Royal Instructions issued to him by the Crown at the time of his appointment, the Governor is charged with certain duties and obligations.

The Governor enjoys the same legal immunities as the Viceroy and he is also required to take oath of allegiance and of office. **110**

The Governor's special powers and responsibilities as proposed in the White Paper are discussed at the end of this Chapter.

256. The Governor in Council should, since the Government of India Act, be read as the Governor acting with Ministers as provided in sec. 46; and the said form does not now necessarily mean the Governor in Executive Council. (T. Ekambara vs. Madras Corporation, 1926 M. W. N. 842. The orders of the Government-Transferred subjects can only be challenged by Writs of *certiorari*. 32 M. L. W. 425).

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Sec. 47 **257. Governor's Executive Council:** The members of the Governor's Executive Council shall be appointed by his Majesty by Warrant under the Royal Sign Manual and shall be of such number not exceeding four, as the Secretary of State in Council directs.

One of them, at least, must be a person who at the time of his appointment has been for at least twelve years in the service of the Crown in India.

Provision may be made by Rules under this Act as to the qualifications to be required in respect of members of the Executive Council of the Governor of a province.

48 The Governor appoints a member of his Executive Council to be its Vice-President.

In the Executive Council of all Governor's Provinces there is the same number of Indian and European members.

47 **258. Executive Council:** The Executive Councillors are appointed by the Crown by warrant under the Royal Sign Manual, as explained in the foregoing para.

According to the Committee's recommendations, the normal strength of an Executive Council in the smaller provinces does not exceed two members; and in the Presidencies four Councillors are appointed.

In the year 1931-32, there was a financial crisis owing which all the provinces were affected, as a result whereof, in all provinces the strength of all the Executive Councils was reduced by 50%. All the major provinces have two Councillors, and minor provinces have one, at present.

259. Port folio System: As in the Central Government, in Provincial Governments also, the system of portfolio, i. e., the department system prevails; the various Councillors are entrusted with separate port folios. In Bombay, each of the four Councillors is entrusted with a separate portfolio, namely (a) Home Department, (b) Revenue, (c) Finance and (d) General portfolio. In Madras and Bengal where there are the same number of Councillors an almost similar department system exists. Sometime back in Madras, when a new Indian Councillor was appointed, the then Governor reshuffled the various departments in contravention of the division of departments prevailing before his appointment. The Councillor took an objection to the same, and on principle, he resigned his office. In provinces, there are fewer Councillors but a similar system prevails.

Each Minister is entrusted with a certain portfolio. In Bombay, there were three Ministers—one for Education, the other for Local Self-Government and the third for Agriculture and Excise.

Owing to financial difficulties, retrenchment was recommended, as a result whereof the strength of the Ministry was reduced. There remained two Ministers in major Provinces and one in minor Provinces.

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280. Business in and procedure at meetings of the Executive Council: All orders and other proceedings of the Government of a Governor's Province shall be expressed to be made by the Government of the Province, and shall be authenticated as the Governor may by rule direct, so that provision shall be made by rules for distinguishing orders and other proceedings relating to Transferred subjects from other orders and proceedings. Every Court of Law shall be bound to take judicial notice of the orders and proceedings so authenticated.

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The Governor may make rules and orders for the more convenient transaction of business in his Executive Council, and with his Ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the Government of the Province.

The Governor may also make rules and orders for regulating the relations between his Executive Council and his Ministers for the purpose of the transaction of the business of the Local Government.

When certain powers are given by Statute to the Governor acting with the Ministers, one of two things must be clearly established; either that the power was as a matter of fact, exercised only by the Governor with the Ministers, or else that the power is notified as having been so exercised as to make it incapable of being called into question. The Government may in the course of its administration of executive functions, delegate many things to subordinate officers. But no such delegation is proper or possible when the right, more especially in the nature of discretion, is created and given by Statute, in a particular manner.

261. Case Law: The requirement of Rule 5 under the Madras City Municipality Act, that the dispensing with shall be, by the special order of the Governor with the Ministers must be strictly complied with. It is not power that can be delegated or that can be exercised under any departmental rules by any person other than the person constituted as the proper authority. (42 Mad. 885. Rel. on: *Ekambara vs. Commissioner of Madras Corporation*, 1926 M. W. N. 842. *Md. Reza v/s. Sadashiva Rao*, 49. Mad. 49.)

262. In case of difference of opinion: If any difference of opinion arises on any question brought before a meeting of a Governor's Executive Council, the Governor in Council shall be bound by the

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Sec. 50 opinion and decision of the majority of those present, and if they are equally divided the Governor or the other person presiding shall have a second or casting vote. If, however, any measure is proposed at the Council meeting whereby the safety, tranquillity or interest of his Province or of any part thereof, are or may be in the judgment of the Governor essentially affected, and if he is of opinion, either that the measure proposed ought to be adopted and carried into execution, or that it ought to be suspended or rejected, and the majority present at a meeting of the Council dissent from that opinion, the Governor may on his own authority and responsibility, by order in writing, adopt, suspend or reject the measure in whole or in part. In every such case the Governor and the members of the Council present at the meeting shall mutually exchange written communications (to be recorded in the secret proceedings) stating the grounds for their respective opinions, and the order of the Governor shall be signed by the Governor and by those members. But, however, the Governor is not empowered to do anything which he could not lawfully otherwise do.

51 **263. Absence of Governor:** If a Governor is obliged to absent himself from any meeting of his Executive Council, the Vice-President or if he is absent, the senior member present at the meeting shall preside thereat with the like powers as the Governor would have had if present; if, however, the Governor is at the time resident of the place where the meeting is held, and is not prevented from signing any act of the Council made at the meeting, the act shall require his signature. But if he declines or refuses to sign it, the act will become null and void

264. Joint Responsibility: It has been previously noted on page 83 *ante* with reference to the Viceroy and his Executive Council, whether they are jointly liable for an order issued by the Viceroy in Council. The same observations apply to the Governor and his Cabinet. All of them (including the dissenting members) are jointly liable for the order issued or act done by the Governor in Council, unless the dissenting members resign their office previously.

265. Representative: but Irresponsible: Executive Councillors are not responsible to Provincial Legislatures, and therefore, by votes thereof they are not bound. If they desire they may allow themselves to be influenced by the vote and the opinion of the Legislative Council. In that behalf, the principle of *representative* form exists.

266. Remuneration of Executive Councillors in all Provinces is not uniform. In the Presidencies of Bengal, Madras and Bombay and in the United Provinces, an Executive Councillor gets an annual salary

of Rs. 64,000/-; in the Provinces of the Punjab and Bihar and Orissa, they get Rs. 60,000/-; in the Central Provinces they get Rs. 48,000/- and in Assam Rs. 42,000/. Sec. 50

267. The Ministers : Theory : In our general observation, we have stated that the theory of Responsible Government in India was first declared by Mr. Montague, the then Secretary of State for India, in Parliament in August, 1917. Pursuant thereto, inquiries were made, committees appointed and consequently recommendations were made by Mr. Montague and Lord Chelmsford. 52

The Joint Report of those two personages is known as the Mont-Ford Report. They were of opinion that the theory of Responsible Government should be first applied in the Provinces. Pursuant thereto, they singled out some heads of provincial departments for the purpose of carrying out their recommendations. They called these heads '*Transferred Subjects*'. They desired that from amongst the non-official members of the Legislative Council some persons should be appointed to administer the Transferred subjects. They termed such persons *Ministers*, as distinguishable from the members of the Executive Council.

The principle of appointment of Ministers seems to be, in short, this: The Ministers are made responsible for their acts and deeds, while administering Transferred subjects, to the Legislative Council. Therefore, those who command confidence and respect of the Council should be appointed Ministers. It is, now, well-known that there are various political parties in the Country and those parties put up their own candidates at the time of general elections. Sometimes, some political parties have their members returned in a majority; sometimes, no party carries any majority in the Legislative Council; but some parties have their creed and policy similar, and they, therefore, combine for the purpose of carrying on business in the Legislative Council. Such a combination is sometimes called '*coalition*'. Some party or parties in combination oppose the acts and bills of the Government, which are, in their opinion, not beneficial to the Country. Owing to this way of their doing business they are known as the *Opposition*. If this Opposition is in a majority, undoubtedly, it commands confidence and respect of the Legislative Council. In theory, therefore, the Government should call upon this Opposition in a majority to form a Ministry. If the Ministry is formed from amongst this Opposition, all the members of the Ministry would be either members of the same political party or at least of the same political thought, policy and creed. It being so, all the Transferred subjects would be administered by the same policy and the Legislative Council (their parties being in a majority) would support them. If, however, no one party is in a majority in the Legislative

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Sec. 52 Council, the Ministry is formed not out of one group, but out of the parties or groups which may command some strength in the Council.

268. Party lines and stability : From what has been observed above, it can be noted that the principle of Ministry on party lines has been introduced. The party, which commands a majority, must ordinarily get into power, as otherwise the members of the minor parties could not carry on their business in the Council. If the Ministers do not get support in the Council by a majority of votes, they could not administer the Transferred subjects, and therefore, they would be obliged to resign. If the majority in the Council passes a vote of no-confidence (*i.e.*, a Vote of Censure) the Ministers must resign according to the established convention. This happened in Bengal on two occasions in the years 1927 and 1928.

The result is that if the Ministry is appointed from the party which is in a majority in Council, there would be a *stable Ministry*; otherwise the Ministers may be obliged to resign at any time and the Ministry would be an unstable one.

Party Government : The principle of appointing Ministers from amongst the party, which commands a majority in the Council, is known as the principle of *Party Government*.

The reader can, with some interest, note the departure from this principle, which, for the first time, took place in the year 1931, in England. This question is discussed on page 84 *ante*. It is, also, a question, whether Ministry in Provinces will be formed in future on the basis of 'a party government,' owing to H.M.'s Government's decision regarding Provincial Legislatures.

808 **269. Minister, Whether an official :** After the appointment of an elected member as Minister, he continues to be the elected member, and is neither liable to resign his membership from his political party, nor is he liable to be termed "official". His seat in the Council after acceptance of office is therefore not liable to be filled in by a fresh by-election.

270. Tenure : According to the provisions of the Act, a Minister holds office *during the Governor's pleasure*; but owing to the theory that we have just explained, the Governor can not deprive him of his office if he commands a majority in the Council. If the Governor desires to deprive him of his office, he would be obliged to dissolve the whole Legislative Council, pursuant to the extraordinary powers with which he is armed.

271 Appointment of Ministers and Council Secretaries: The Act provides that the Governor of a Governor's province may, by notification appoint Ministers, not being the members of the Executive Council or other officials, to administer Transferred subjects and any member so appointed shall hold office *during his pleasure*. The Minister so appointed is entitled to the same salary as is payable to a member of the Executive Council, unless the Legislative Council otherwise decides by vote. There is a provision in the Act for the appointment of Council Secretaries, who would occupy the position of an English Under-Secretary.

We have so far dealt with the question of Ministers generally; now we propose to deal, in short, with each point specifically.

272. Joint liability. Appointment: We have generally described how the appointments are made; after the general elections are over and the results are officially declared, according to Parliamentary practice, the Governor would invite the leader of the party which is in majority, to accept the responsibility of forming the Ministry. If the leader accepts such responsibility, he would be called upon to submit three (or less as the case may be) names to the Governor for his approval; if the Governor has any objection to any one of them there would be a discussion with the leader and eventually three (or less as the case may be) persons would be appointed Ministers by the Governor, *during whose pleasure*, the Ministers would hold office. If the appointments are so made, all the Ministers would have the same policy and would be responsible to the same party, and therefore the principle of joint liability, *inter se*, would exist. In that event, whenever the question of policy or responsibility arises, they would deliberate jointly and would take a joint action. This principle, at present, exists in the Madras Ministry.

If the appointments cannot be made in the aforesaid manner, the Governor would call upon other three leaders (or less as the case may be) who command respect, confidence, and some support in the Council, to accept the responsibility of Ministership. The Ministers so appointed cannot have *the same* policy and therefore they cannot take a joint action. The principle of joint liability would, therefore, not exist. Each Minister is responsible for his own policy and action, but is responsible to his party, if the party is well organised. They are, however, responsible to the Council.

273. Minister's Salary: To any Minister so appointed the same salary may be paid as is payable to a member of the Executive Council in the province, unless smaller salary is provided for by a vote of the Legislative Council of the province. 52(1)

Sec. 52 Pursuant to this provision, the Bombay Legislative Council has, by an Act, fixed the salary of Ministers at Rs. 4,000/- per month.

274. Ministers : Responsible to whom ? Section 52 gives the Governor a wide power to appoint Ministers from amongst the elected members of the Legislative Council, and further provides that "*Ministers so appointed shall hold office during his pleasure.*" By the same section, the salary of the Minister is made a subject of vote of the Legislative Council of the Province. Such being the legal and constitutional position, the Minister has to satisfy and secure the assistance of both the Governor and the Legislative Council.

275. Who is the administrator of Transferred Subjects ? By Statute, the Minister, with the support of the Council, is the administrator of Transferred subjects, and the Governor has a right to interfere only when he sees sufficient cause to dissent from the Minister's opinion. The proviso to the section does not empower the Governor to interfere even in trifling cases. It is submitted, that he has a right to interfere only in the cases in which the Secretary of State has a right so to do. Those cases are enumerated at page 57 *ante*.

By Statute, the Minister is, no doubt, the administrator, but the Governor, owing to his superior constitutional position, can, if he so desires, dominate over the administration of Transferred subjects. The observations of the Joint Select Committee on the question have been quoted at page 111 *post*. Moreover, owing to the principle that any action of the Governor cannot be criticised by the Legislative Council, whereas the administration of Ministers can be freely criticised, the view that the Minister should be considered the administrator of Transferred subjects is strengthened. Similarly, this legal and constitutional position lends support to the construction that the Minister should be allowed to shoulder the responsibility of the administration of Transferred subjects with the support of the Council and the Governor should interfere only in exceptional cases referred to at page 57 *ante*.

52(2) If the Minister appointed is not a member of the Legislative Council at the time of his appointment, he must seek election and be an elected member within six months from the date of his appointment.

In relation to Transferred subjects *the Governor shall be guided by the advice of his Ministers*, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice.

Council Secretaries: The Governor of a Governor's Province may at his discretion appoint, from among the non-official members of the Local Legislative Council, Secretaries, who shall hold office during his pleasure and discharge such duties in assisting members of the

Executive Council and Ministers as he may assign to them. The salary of such Council Secretaries would be fixed by the Legislative Council.

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If the Governor does not follow the advice of his Minister the Minister can resign his office after having made a statement on the floor of the House (Legislative Council). But it would be a difficult task for the Governor not to follow his Minister's advice if the Legislative Council, by a majority, support him.

The Joint Committee lays down the relation between the Governor and his Ministers as follows : "Ministers who enjoy the confidence of a majority in the Legislative Council, will be given the fullest opportunity of managing this field of Government which is entrusted to their care. In their work they will be assisted and guided by the Governor, who will accept their advice and promote their policy whenever possible. If he finds himself compelled to act against their advice it will only be in circumstances roughly analogous to those in which he has to override his Executive Council, circumstances which will be indicated in the Instrument of Instructions furnished to him on his appointment by His Majesty. It will be for him to help with sympathy and encourage the popular side of his Government in their new responsibilities. He should never hesitate to point out to Ministers what he thinks is the right course or to warn them if he thinks they are taking the wrong course. But if after hearing all the arguments, Ministers should decide not to adopt his advice, then in the opinion of the Committee, *the Governor should ordinarily allow Ministers to have their way, fixing the responsibility upon them.* It is not possible but that in India, as in all other countries, mistakes will be made by Ministers acting with the approval of the majority of the Legislative Council, but there is no way of learning except through experience, and by the realisation of responsibilities."

276. Ministers vis-a-vis the Council : Vote of no-confidence :
It has been stated above that the Legislative Council may pass a vote of no-confidence in a Minister. If the Minister desires to do a certain act or deed, the Legislative Council may express their opinion against such policy, act or deed by moving a resolution expressing no-confidence in that particular Minister and by carrying the same by a majority. There is another way of expressing their *want of confidence* in the Minister; this can be done when the grant for the Minister's salary is demanded; when such a demand is made the Legislative Council may refuse the demand or may move a token "cut" reducing the salary of the Minister. If such a *refusal* or *cut* is carried by a majority of votes, it amounts to 'want of confidence' in the Minister. When a Minister moves for any grant, any member can move a *token cut* making it clear that the same is moved to express 'want of confidence'

Sec. 52 in the Minister. Under any of these circumstances, the Minister should resign his office. It is not absolutely necessary to refuse the demand in *toto* . It will be quite sufficient even if a 'cut' or refusal of a rupee is passed by a majority of votes.

Every 'cut' that may be moved does not necessarily amount to a vote of no confidence. Sometimes, with a view to raise a debate on and discuss the policy of a Minister in the Legislative Council, a cut may be moved and under those circumstances even if the cut is passed a Minister would be under no obligation to resign. But in such cases, the matter is not, generally, pressed to a 'division', the purpose having been served by raising a general debate.

277. Constitutional question: At the February (1929) Budget Session of the Bombay Legislative Council, Mr. Jog moved a token 'cut' of Rs. 100/- when the Hon'ble the Excise Minister demanded a grant for the Excise Department, and it was passed with an overwhelming majority. The Mont-Ford Report contemplated that the Legislature "will have full means of controlling their (Ministers') administration by refusing them supplies or by means of votes of censure the carrying of which may in accordance with established constitutional practice involve their quitting office". On a very strict interpretation of this recommendation, the Council's vote ought to have led to a result different from the one adopted by the Hon'ble Minister concerned. The Constitutional Head of the Province should have, under the circumstances, invited the attention of the Minister to the constitutional impropriety of his continuing in office. However, on Mr. J. C. Swaminarayan rising to a point of 'order' (which was construed as really a point of 'information'), the Hon'ble the President informed the House of the procedure and practice as follows: "I have just informed the Hon'ble members that the practice which has been followed is, that a Re. 1/- 'cut' or a 'cut' of a very small amount like that would always be taken as a censure motion but a cut of any bigger amount would be taken as a motion for general discussion. It would depend upon what the total amount is. In this particular case it was suggested just now that the Rs. 1,000/- cut proposed by Dr. Guilder should be taken as a motion for general discussion as it was small in comparison with the total amount, but I have allowed this 'cut' of Rs. 100/- for general discussion". In view of this practice, nothing can be said seriously against the Minister concerned. The Governors and the Ministers seem to view such a 'cut' as merely an expression of opinion by the Legislatures. The White Paper seeks to make a very strict and clear provision in that behalf which is considered at page 123 *post*.

278. Governors and Ministers: By the Instrument of Royal Instructions, the Governor is instructed in the following terms: "Inasmuch as certain matters have been referred for the administration according to Law of the Governor in Council in respect of which the authority of

Our Governor in Council shall remain unimpaired; while certain other matters have been transferred to the administration of Governor acting with a Minister, it will be for you so to regulate the business of the Government of the Province, that so far as may be possible, the responsibility for each of these respective classes of matters may be kept clear and distinct."

"Nevertheless you shall encourage the habit of joint deliberation between yourself, your Councillors and your Ministers in order that the experience of your official advisers may be at the disposal of your Ministers and that the knowledge of your Ministers as to the wishes of the people may be at the disposal of your Councillors."

The Joint Select Committee's Report made the following recommendations. "It will also be for him to help with *sympathy and courage* the popular side of his Government in their new responsibilities. He should never hesitate to point out to Ministers what he thinks is the right course or to warn them if he thinks they are taking the wrong course. But if after hearing all the arguments Minister should decide not to adopt his advice, then, in the opinion of the Committee *the Governor should ordinarily allow ministers to have their way fixing the responsibility upon them* even if it may subsequently be necessary for him to veto any particular piece of legislation. It is not possible but that in India as in all other countries mistakes will be made by Ministers, acting with the approval of a majority of the Legislative Councillors; but there is no way of learning except through experience and by the realisation of responsibility."

279. Matters affecting both Reserved and Transferred Subjects: *Devolution Rule 9:* Devolution Rule 9 is framed with a view to enable the Governor to do the needful in the matter. The Rule runs as follows: "When a matter appears to the Governor to affect substantially the administration both of a Reserved and of a Transferred subject and there is disagreement between the members of the Executive Council and the Minister concerned as to the action to be taken, it shall be the duty of the Governor, after the consideration of the advice tendered to him to direct in which department the decision as to such action shall be given; provided that.....important matters.....be considered by the Governor with his Executive Council and his Ministers together."

280. Revenues and Transferred Subjects: The Joint Select Committee did apprehend that difficulty would arise in the matter of revenues. They, however, did not like to allocate certain sources of revenue to Reserved and certain sources to Transferred subjects. In

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their opinion, they thought it necessary to recommend that the Governor should allocate the revenue in a definite proportion. They added the following recommendations: "The Committee desire that the relation of the two sides of the Government in this matter as in all others, should be of such mutual sympathy that each will be able to assist and influence for the common good of the other, but not to exercise control over it.....But on the other hand the Executive Council should be helpful to Ministers in their desire to develop the departments entrusted to their care. The Governor personally will devolve the task of holding the balance between the legitimate needs of both sets of his advisers."

On these recommendations the necessary Devolution Rules are framed in that behalf.

281. Case of emergency and temporary administration of Transferred Subjects: Where the minister is obliged to resign owing to a vote of no-confidence in him having been passed by a majority of the Legislative Council, the question arises how to deal with the administration of Transferred subjects. It has been provided that rules may be made for the temporary administration of the Transferred subjects in such cases: of emergency. Accordingly, rules to the following effect have been made: In case of emergency, where, owing to a vacancy, there is no Ministry in charge of a Transferred subject, the Governor (1) must, if another Minister is available and willing to take charge of the subject, appoint him to administer the subject temporarily; or (2) may, if the vacancy cannot be provided for in the above way, himself, temporarily administer the subject, and while so doing, must exercise in relation to it, all such powers in addition to his own powers as Governor, as he could exercise if he were the Minister in charge thereof. If the Governor himself undertakes temporarily to administer a Transferred subject, he must certify that an emergency has arisen, in which, owing to a ministerial vacancy, it is necessary for him to do so and must forthwith forward a copy of such certification to the Governor-General in Council.

According to these provisions practically the Governor will stand in the position of a Minister. The Transferred subject does not cease to be such because the Governor has to administer the same.

Such a case of emergency had arisen in Bengal and Nagpur in the year 1924. Ministers in those provinces, were not formed from among the political party in power, *i. e.*, in majority in the respective Legislative Councils.

The respective Legislative Councils, by a majority succeeded in passing a vote of no-confidence in the Ministers, and consequently they were obliged to resign their offices. No other party was prepared to form a Ministry; the result was that the respective Governors had to take upon themselves the administration of Transferred subjects.

Even after 1924, in Bengal and Nagpur, votes of no-confidence were successfully passed by the respective Legislative Councils.

282. Ministers and their following: Constitutional issue: The principle of the appointment of Ministers has been hereinbefore discussed. It must have been noted that either a leader of one party or leaders of various parties are appointed Ministers. That shows that when they are appointed Ministers they have a certain following in the Council. It may so happen subsequently that the members of the parties may either resign or vacate their seats; if it so happens, the Minister loses the original strength of his following. Constitutionally, under these circumstances the Minister in question should resign his office. In Nagpur, Mr. Deshmukh offered to resign his office on that ground, in July 1930. In view of the events that happened in the country in the year 1930, such constitutional position arose almost in every province. Mr. Deshmukh was the only Minister who acted strictly according to the constitutional method.

283. Parliament and Ministers: The Mont-Ford Report recommended that Parliament must be prepared to forego the exercise of its own power of control over matters, responsibility whereof has been transferred to representative bodies in India. By a well established convention the House of Commons has held that Parliament would not interfere in the administration of Transferred subjects.

On February 23rd, 1921, Mr. Montague, the then Secretary of State for India, was questioned re: the appointment of Mr. Harkishan Lal as a Minister in the Punjab, who was convicted on a charge of conspiracy to wage war against the King. On this question, various supplementary questions were asked and ultimately, the Speaker of the House of Commons intervened and gave a Ruling in the following terms: "It is highly undesirable that this House should interfere in any way with the control by those Provincial Legislatures of their own affairs. The Ministers are responsible to Legislative Councils even if this House were to pass some censure either direct upon such a Minister upon the questions of Transferred subjects, I still hold that there is no right of interference by this House."

There is no reason to doubt the acceptance of this principle by the House of Lords. It can safely be stated that the principle is accepted by Parliament.

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On 30th November 1931, Major Milner asked in the House of Commons for the grounds on which the Bombay Government had withdrawn the exemption of the Dawoodi Bohra Community from the operation of the Mussalman Waqf Act. Sir Samuel Hoare (the Secretary of State) in a written answer stated that as 'religious charitable endowments' is a Transferred subject under the Government of India Act, it is dealt with by the Governor acting with his Ministers and he is unable to interfere with their discretion.

284. Provincial Finance Department and Ministers: The Finance Department in a Governor's Province is controlled by a member of the Executive Council. Such a member has got one Financial Secretary subordinate to him. If the Ministers desire a Joint Secretary may be appointed by the Governor after consultation with them. Such Joint Secretary would be entrusted with the work of dealing with and examining financial questions relating to Transferred subjects.

After grants have been voted by the Legislative Council, the Finance Department is empowered to sanction any re-appropriation within a grant from one major, minor or subordinate head to another. The Member or Minister in charge of a department can authorise re-appropriation only within very narrow limits.

It has been noted above that the Ministers have to consult the Finance Department for carrying out their policy, where the question of expenditure arises.

There is a complaint against the Finance Department that the Finance Member being an Executive Councillor is not able to do justice to the Transferred Departments.

In the July (1928) Session of the Bombay Legislative Council, this question was raised on the subject of primary education in the Presidency. Mr. Pahalajani set the ball rolling by moving a resolution on the subject. The Hon'ble Minister for Education while replying stated: "funds permitting is the basis of the whole show". If this is the position of the Minister, he has merely to frame schemes and therefore it is contended that the Minister should resign and ask the Government to wind up the separate Education Department on the Transferred side. It is also contended, under those circumstances, that it is the constitutional duty of the Minister to inform the Government that it would be unconstitutional for him to continue in office. It is the duty of the Finance Member to find out ways and means to raise the necessary revenue for the administration of Transferred subjects and it is unconstitutional to ask the Opposition to suggest ways and means in that behalf. In the opinion of Lord Goschen (Ex-Governor of Madras) diarchy, under the circumstances, encourages irresponsibility.

285. In Actual working, the procedure is as follows: The Departments concerned make certain recommendations and forward the same to the Minister in charge thereof; these papers first go to the Secretary of the Minister; the Secretary notes his minutes either agreeing or disagreeing with the recommendations of the Department and in case of disagreement offers his own recommendations. The papers then go to the Minister. If he agrees with his Secretary, orders are issued accordingly. If the Minister disagrees, the papers are submitted to the Governor together with the minutes of all those concerned. The order of the Governor on such papers is considered final, unless in cases of interpretation of the Act or of policy, the Minister demands the ruling either of the Government of India or of the Secretary of State.

Though the Act provides that the Governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, the reports are to the contrary. At this stage, it may, however, be noted that the Secretaries are members of the Indian Civil Service; Council Secretaries are not appointed though provided for by the Act. We have considered this question, somewhat in detail, under various heads hereunder.

So, the actual position is in substance as follows: The Minister receives the papers, makes his own minute and either forwards them to the Governor or returns the same to his Secretary, and when there is a disagreement between the Minister and his Secretary, the Governor has the last word even in Transferred subjects unless the Minister appeals as stated before.

286. Diarchy and its defects: The dual form of Government is known as *Diarchy*. It has some inherent defects and we propose, in short, to point them out. Observations of the Joint Select Committee and the Royal Proclamations indicate that joint deliberations between the members of the Executive and the Ministers should be encouraged. Various provincial Governments have failed to do so. Another defect is the provision that the Executive Council and Ministers should not oppose each other in the Legislative Council either by speech or by vote. Now suppose the Ministers do not approve of the measure adopted by the Executive Council, what should they do? They cannot oppose owing to the provision stated above. They cannot support because it is against their policy. In any event, the Ministers would be unable to discharge their duty both towards their electors and their Council. The third defect is the present relations between the Ministers and the public

Sec. 52 *services. The Ministers' Secretaries are members of the I. C. S. and have not been what they should have been. Moreover, they are empowered with the right of access to and pre-audience with the Governor. They have, thus, the opportunity of influencing the Governor before the Ministers can present their case. In England, Under-Secretaries have no such right and it is surprising to Indian constitutionalists why such rights are given to the Secretaries in India. The Secretaries can even challenge the decision of the Ministers. It is submitted, and perhaps rightly, that the Ministers being responsible to the Legislative Council (and not to the Secretary of State) should have the freedom of arriving at a decision and the executive authorities should give effect to the same. It has been held by Parliament that the Ministers are responsible to the Local Legislatures and that it has no right of interference; it would be futile for it (Parliament) to pass some censure, either direct or indirect, upon a Minister. If the Legislative Council, to whom the Minister is responsible, shall not approve of the action, the same shall be thrown out by it; but there is no reason why the Executive should interfere when they are not responsible. The next defect is that owing to the present way of the working of the diarchy, the Ministers are treated as members of the official bloc, which consists of the Executive members of the Government, Secretaries, other officials and nominated non-officials, and has tended to obscure the responsibility of the Ministers to the Council. An unpopular Minister can carry his day in the Council with the help of the official bloc; he may also become an instrument in the hands of the Executive. The sixth defect is the relation between the Minister and the Finance Department. These relations are described somewhat in details above. Because the power of purse remains with the Finance Department, i.e., with the Executive branch, the Ministers can have very little freedom in respect of their pockets. The time has, now, arrived that a system of separate purse should be introduced. There is another defect in the provision that previous and subsequent sanction of the Viceroy in respect of the proposed Acts of Legislature must be obtained. Sir John Simon has described this as an ingenious scheme. Another defect is the existence of the official bloc. There is one more defect created by the Government in the actual working of diarchy. Ministers are promoted to higher offices, e.g., Councillorship or Membership in the India Council. The Ministers have to come in conflict on many occasions with the irresponsible side of the Government; and therefore, such promotions cannot be justified according to a sound constitutional theory; if the Ministers desire to carry out their responsibilities towards their country and the electo-*

rate, they should refuse acceptance of such offices. The very fact that some of the Ministers did not succeed in resisting the said temptations held out by the Government, shows that a really sincere Government should not hold out such temptations to Ministers. In actual working, the principle of joint responsibility is not preserved either by appointing Ministers from the majority party or a *Coalition* Ministry from different groups.

287. Is Diarchy desirable and workable?: Under these circumstances, it has been contended by Indian constitutionalists that this dual form of administration which is technically called the *Diarchy*, is both unsuitable and unworkable. It is impossible for the Governor to keep two minds—one absolute and the other popular. He cannot administer two contradictory halves of his Government. There are various defects in the actual working of the Act—some of them have been actually discussed—and it is absolutely impossible to find out a way of successfully working the diarchy under the present constitution. If the principle of “Responsible Government” has to be introduced in the Provincial Government, there should be one form of government, viz., autonomous government.

S. Sinha's views on various problems relating to Diarchy: Mr. Sachidanand Sinha, ex-Finance Member of the Government of Bihar and Orissa, while discussing the report submitted by the Governor in Council of that Province to the Government of India on the working of the reformed constitution expressed his views on various diarchical problems in the following terms :

Dependent position of Ministers : “ To begin with, we are assured that there have been no constitutional difficulties in relations between Sir Henry Wheeler and the members of his Government By the phrase, ‘ members of the Government ’ the obvious reference from the context is to the Ministers and not to the Executive Councillors. The latter are practically the equals of the Governor, who cannot either appoint or dismiss them, as he does his Ministers, and as was done, for instance, sometime back by the Government of Madras and on the other occasion by the late Government of the United Provinces, in spite of the facts the Ministers had, in each case, the support in their policy of the majority of the non-official elected members of the Legislative Council. In case of difference between the Government and the Executive Councillors, the former cannot over-rule the latter. Unlike the Government on the Transferred side—the Governor in Ministry—the principles of joint responsibility of the Governor in Council are too well established both by law and convention. The papers have, therefore, to be circulated amongst the other Executive Councillors and the final

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decision arrived at is that of the majority of the Members of the Government on the Reserved side That being so, it is quite clear that no constitutional differences can possibly arise between the Governor and his Executive Councillors. They can do so only between him and his occasionally strong Ministers, although the latter being the Governor's creatures and altogether dependent upon him, alike for appointment and dismissal, are not likely to prove assertive enough to create deadlocks..... He has the dominant or rather predominant power and exercises by reason of his full status and power, an amount of influence over his Ministers which makes them, in effect, dependant upon—if not subservient to his will... There has been given effect to in province after province the sinister and insidious policy wholly indefensible because gravely unconstitutional, of the promotion of Ministers, to the Executive Council. ..

"Both Sir Mahomed Fakrudin and Sir Ganesh Dutta Singh were Ministers throughout the period... Speaking so recently as in March 1927, in the Legislative Council, Sir Mahomed declared that the Ministers were impotent and they are certainly powerless as they have to serve under various restrictions and limitations. He added that 'without the power over purse others consider as if he was simply a clerk to prepare a certain scheme and after that scheme is ready, the Finance Department was entitled to knock it down on the ground of want of fund. Sir Ganesh... expresses himself as follows: 'The recommendations of Ministers in certain matters are restricted by the suggestions of local officials, who serve under the Reserved side of Government, and frequently Government is, therefore, hampered by consideration of prestige of Officers of these services..' Thus on the testimony of two Ministers themselves it is clear that there has been (on the Transferred side) *a government on sufferance*, pure and simple But unfortunately that is not all. The opinions of the various department Heads and Secretaries are reflecting upon the work of the Ministers I hasten to quote the words of the Ministers themselves: 'The relations between the Ministers and the Public Services were generally smooth as far as practicable The orders passed by us were carried out without any *apparent resentment*. There were occasional protests from the Local Officers when the Reformed Government, did not act according to their wishes. ... That the opinions of the Secretary of the Education Department, the Director of Public Instruction, the Director of Agriculture, all constitutionally and theoretically direct subordinates of the Ministers, have been quoted with evident approval by the Governor in Council,..... taken as text for their own comments,..... brings into prominent relief the mockery of the position in which the poor Ministers stand in the Scheme known as Diarchy....." 12

288. Constitution of New Provinces, etc.: Provision has been made in the Government of India Act for constituting a new Governor's province. The Governor-General in Council may after obtaining the expression of opinion from the Local Government and the Local Legislature affected, by notification, with the sanction of the Crown, previously signified by the Secretary of State in Council, constitute a new Governor's Province, or place part of a Governor's Province under the administration of a Deputy Governor to be appointed by the Governor-General. Sec. 51A

Pursuant to this Provision, The N. W. Frontier Province was, in April 1932, converted into a Governor's province and the Mont-Ford Reforms were made applicable thereto. 52

Provision has been made to exclude jurisdiction of a Court of Law questioning the validity of any order made or action taken after the commencement of this Act by the Governor-General or the Local Government if they were empowered so to do previously. 52B

289. Lieutenant-Governorship and appointments : The Governor-General in Council may, by notification with the sanction of the Crown previously signified by the Secretary of State in Council constitute a new Province under a Lieutenant-Governor, who shall be appointed by the Governor-General with the approval of the Crown. A Lieutenant-Governor must have been at the time of his appointment at least 10 years in the service of the Crown in India. 53

The Governor-General in Council with the approval of the Secretary of State in Council are empowered to create a Council in any Province under the Lieutenant-Governor. They are also empowered to fix the number of members (not more than four). 54

The Lieutenant-Governor has got the same powers to appoint a vice-president as the Governor of a Province has. 55

Business of Lieutenant Governor in Council is almost similar to that of a Governor in Council. 56

British Baluchistan, Delhi, Ajmer-Merwara, Coorg, and the Andaman and Nicobar Islands shall be administreed by their respective Chief-Commissioners. 57

The Governor-General in Council may, with the approval of the Secretary of State and by notification, take any part of British India under the immediate authority and management of the Governor-General in Council and thereupon give all necessary orders and direction regarding the administration of that part, by placing it under a Chief-Commissioner or by otherwise providing for its administration. 58

Sec. 60 We have dealt with in a previous Chapter, powers of the Governor-General in Council to declare and alter boundaries and provinces.

61 An alteration pursuant to the foregoing provisions, shall not affect the law for the time being in force in that part.

290. Case Law : Alternation of the jurisdiction of the Local Government does not affect the jurisdiction of civil courts. (*Kesso Prasad vs. Nirbal*, 5 Pat L. J. 451). Re-distribution of territories does not by itself make an Act inapplicable in a place in which it was already in force. (*Satya Narayan vs. Annapurna*, 40 Cal. L. J. 523).

62 **291. Extension of boundaries of Presidency Towns :** The Governors of Bombay, Bengal and Madras in Council are empowered with the approval of the Secretary of State-in-Council, to extend the limits of the towns of Bombay, Calcutta and Madras respectively.

292. Recommendations of the Indian Statutory Commission : (*Vol. II, Paras, 37 to 65*): *Unitary Government:* The Commission recommend establishment of Unitary Government in provinces. They propose that the rigid division into Reserved and Transferred subjects should disappear.

293. Joint Responsibility : They propose the principle of Joint Responsibility, *i. e.*, members of the Provincial Cabinet should be required and prepared to take responsibility for the whole policy of the Provincial Government.

294. Formation of the Cabinet : The Governor is empowered to form a cabinet after general election, which will include in it one non-elected person or more (who would thereupon become *ex officio* member of the Legislative Council) and ought to be known as Minister like his colleagues. Ordinarily, such persons would, they conceive, be experienced officials; but on occasions, a non-official Indian or Englishman, not belonging to the Legislature, may be appointed. The Governor has to decide acting under the superintendence and control of the Governor-General. All other members of the Cabinet would be the elected members of the Provincial Legislature. They propose that there should be no statutory classification of subjects such as would make it legally impossible for a Minister chosen from the elected members to be in charge of any of them.

295. Inclusion of officials in a cabinet under the suggested provincial autonomous constitution is opposed to the constitutional principles of 'Responsible Government'. It may, at present, look simple, but in actual working it would subvert the honest and pious intention of granting provincial autonomy and it might prove worse than diarchy.

The position of such an official member as a Minister will be anomalous. Such an officer would generally be an I.C.S. Statutorily, he would be under the control of the Secretary of State. Any vote of no-confidence in the Ministry could not, therefore, compel him to resign. And, his continuance in spite of a vote of no-confidence will be against all constitutional principles of Responsible Government.

296. Statutory Restrictions : Proposals of far-reaching consequences in the history of constitutional law are made : Firstly, it is proposed that it should be provided in the constitution that Ministerial salaries are not liable to be reduced or denied by a vote in supply; the existing scale of salaries should be alterable only by a Provincial Statute regularly passed through all its stages. Secondly, it is proposed that it should be constitutionally established that the only vote of censure which would be proposed would be one against the Ministry as a whole carried after due notice; the practice that has grown up in some provinces of claiming to censure one Minister without thereby involving his colleagues is destructive of the principles of joint responsibility. It seems the Commissioners forget that under the Mont Ford Scheme majority of the Governors did not carry out the recommendation of joint responsibility, and in the absence of such joint responsibility there was nothing which could destroy the principle of joint responsibility. If anybody is to be blamed, it is the Governors who did not act according to the recommendations and did not appoint Ministers on the principle of joint responsibility. They recommend this grave unconstitutional change on the ground of stability and a less precarious tenure of the Ministry.

297. Note: Constitutional position: The aforesaid proposals seek to have a statutory denial of the right of a legislator. It is discussed hereinabove how a member of the Legislative Council can express want of confidence in a Minister in three different ways. This right is sought to be statutorily denied. When there is such statutory denial it would be very difficult to remedy the proposed evil because the Government of India Act would be then required to be amended by another Act of Parliament, which we have found by experience to be almost an impossibility. It may be contended that when a complete provincial autonomy is in the stage of an experiment there must be some safeguard; but this safeguard can be well provided for either in the Rules or in the Standing Orders, that shall have to be framed under the Act so that the Rule or Standing Order can be amended without any difficulty when we have reached a stage at which such a grave transitional safeguard may not be needed. In view of these facts, this statutory denial (*i. e.*, denial of the constitutional right to express want of confidence in a Minister embodied in the Government of India Act) is highly objectionable.

Sec. 288. Ministry and cabinet: In the second part of this treatise, 'Ministry' and 'Cabinet' are discussed. The Commission have proposed the appointment of Ministry and Cabinet on the British constitutional principles.

299. Governor *vis-a-vis* his Cabinet: In the opinion of the Commission, the intensity of communal division, the general absence of stable parties with assured majorities in the Legislature and the lack of experience of the working of a fully responsible system of government, present insuperable obstacles in recommending the position of a Governor as a constitutional head. They, therefore, recommend a statutory power to be given to the Governor to direct that action should be taken otherwise than in accordance with the advice of his Ministry only for certain purposes such as the preservation of peace, good government, safety and tranquility of the province and to prevent serious prejudice to a minority community. They also recommend reserved powers for the Governor in matters relating to financial safeguards and in respect of certain classes of legislation. They also propose that the Governor should have over-riding powers in respect of due fulfilment of any liability of Government, not subject to the vote of the Legislature, securing the obedience of any order from either the Government of India or the Secretary of State and carrying any statutory duty imposed on the Governor personally.

300. Objection: In view of the events that happened in 1930 and 1932 all these over-riding powers, though they look simple and even necessary will make a Governor autocratic and will amount, in actual working, to denial of provincial autonomy.

301. Police, the C. I. D. and the Services: They propose that the Police Department may be placed under the control of a Minister; but the C. I. D. should be made an All-India subject and it should be placed under the Government of India. Under this recommendation, a member of the C. I. D. can shadow and 'outwit' a Minister because he would not be under the control of the Ministry. Services—the I. C. S. and such other Imperial services—would be controlled by the Secretary of State.

302. Provincial autonomy whether effective in actual working: It should now be considered how the proposed and the so called provincial autonomy would work. In view of the following points there would not remain even a shadow of Responsible Government: (1) Inclusion of an official in the Cabinet; (2) formation of the Cabinet; (3) statutory powers of the Governor to override the Ministry; (4) the position of the I. C. S. and such other Imperial services; (6) the C. I. D. under

the government of India ; (6) statutory denial of the present constitutional rights of an expression of want of confidence in a Ministry ; (7) Governor's position not merely as a constitutional head ; (8) right of pre-audience of a Secretary with the Governor ; (9) relations of Ministers with the finance department and the recommendations re: fiscal and such other conventions ; (10) preservation of non-votable items ; (11) power of the Governors re: restoration of rejected bills ; (12) recommendation of taxation on new lines, e.g., income-tax on agricultural land, excise on 'bidies' and Indian matches, etc., and thereby the creation of a Provincial fund ; and (13) irresponsible position of the Central Government. These recommendations would tighten the hands of the Central Government and Provinces would be at their mercy.

Proposals in the White Paper Regarding Provincial Governments in British India.

303. It has already been observed that a Federation of the British Indian Provinces and Indian States has been proposed. The principles of Federation have already been discussed at pages 91 to 95 *ante*. A Province therefore should either be a sole governing or an autonomous body. Accordingly, an attempt has been made to create a Province on the basis of a self-governing or autonomous unit.

It may here be observed that hitherto there were three Presidencies *viz.*, Bombay, Bengal and Madras. It is now proposed to discontinue the distinction of a Presidency and even these Presidencies will thenceforth be known as Governor's Provinces along with others.

It is proposed to create eleven Provinces, *viz.*, Bengal, Madras, Bombay, the United Provinces, the Punjab, Bihar, the Central Provinces (excluding Berar, if necessary), Assam, the North West Frontier, Sindh and Orissa.

304. **Executive Government to vest in the Crown :** The seven Provinces mentioned in the foregoing para will become autonomous units; the government of each to be administered by a Governor representing the King; and such a Governor will hold office during his Majesty's pleasure. All executive acts will run in the name of the Governor.

The Governor will exercise the powers conferred upon him as the executive head of the Provincial Government and such powers of His Majesty as His Majesty may be pleased by Letters Patent to delegate to him. Instruments of Instructions will also be issued to them in the same way in which it has been proposed to be issued to the Governor-General. The constitutional and legal position of such Instruments of

Sec. Instructions will also be the same as that of one that has been proposed
W.P. to be issued to the Governor-General. (Paras 61, 64, Proposals; para 45, Introduction.)

Constitutional question: The proposal is, it must have been noted, that the Governor will act as the King's representative and therefore it is clear that the fountain of the authority will be the King. It has already been observed, that the constitutional question therefore arises how can such a Province be termed in the strict legal and constitutional sense an autonomous Unit. Technically, such provinces can be described, with great doubt, as Autonomous Units.

305. The Provincial Executive: Ministers: Formation of Ministry: The Governor will be aided, advised and guided by a Council of Ministers responsible to the Legislature of the Province. These Ministers will be entitled to tender advice to the Governor on all matters which fall within the Provincial sphere other than the use of powers described by the Constitutional Act as exercisable by the Governor at his discretion. The Governor will be entitled to overrule his Ministers' advice if in his judgment the same is inconsistent with fulfilling the special responsibility with which he is charged.

306 Appointment of Ministers: The Ministers will be chosen and summoned by the Governor and sworn as members of the Council, and will hold office during his pleasure. Such persons must be, or become within a stated period, members of the Provincial Legislature. (Para 66, Proposals; para 45, Introduction.)

The principle on which the Federal Ministers are to be appointed will, also, be observed in the case of Provincial Ministers (Para 67, Proposals.)

The salary of the Ministers will be regulated by an Act of the Provincial Legislature. (Para 68, Proposals.) The salary will not be made a subject to express 'no confidence.'

307. President: The proposals in this behalf are the same as those made for the President of the Federal Executive.

The constitutional objection to the Governor presiding over the Provincial Executive is the same as the one in respect of the Governor-General presiding over Federal Government.

308. Governor's Special Responsibilities: In the administration of the Government of a Province the Governor will be declared to have a 'special responsibility' in respect of (a) the prevention of any grave menace to the peace or tranquility of the Province or any part thereof;

(b) the safeguarding of the legitimate interests of minorities ; (c) the securing to the members of the Public Services of any rights provided for them by the Constitution and the safeguarding of their legitimate interests ; (d) the prevention of commercial discrimination ; (e) the protection of the rights of any Indian State ; (f) the administration of areas declared, in accordance with provisions in their behalf, to be partially excluded areas ; and (g) securing the execution of orders lawfully issued by the Governor-General. (Para 70, Proposals.)

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It must have been noted that these special responsibilities of the Governor are almost identical with those indicated in the case of the Governor-General with the exception that the Governor-General's special responsibility will apply to the whole of India. (Para 47, Introduction.)

309. Discretion of the Governor: It will be for the Governor to determine in his discretion whether any of the "special responsibilities" here described are involved by any given circumstances. (Para 70, Proposals.) The Governor will be entitled to use his own discretion and act as he thinks fit in spite of a contrary advice given by his Ministers in respect of the matters for which special responsibility has been imposed upon him. (Para 71, Proposals.) But while so doing, he will not act contrary to or inconsistent with Instructions, contained in the Instrument or as may be given to him by the Governor-General or by a principal Secretary of State. (Para 72, Proposals.)

Note : It is unnecessary to repeat what has been observed in paras 286 and 287 *ante*. It is apprehended, and perhaps with justification owing to the experience in the past, that a strong Governor with these powers may nullify the principle of Provincial Autonomy. It has, also, been proposed to vest special legislative powers in the Governor. Mr. S. Sinha opines that with all these powers the Provincial Autonomy will be reduced to the Governor's autocracy.

310. Instruments of Instructions has been referred to in the foregoing paras. It will be almost similar to one which is proposed to be issued to the Governor-General. This subject has been discussed in paras 236 and 237 *ante*.

311. Ministers' Salaries : Whether Votable : In paras 220 and 230 *ante*, the question of the appointment of Ministers has been discussed. Nothing is specifically made clear in the White Paper itself whether the salary of the Minister will be subject to the vote of the Provincial Legislature once it is fixed by an Act of that Legislature. Para 66 (Proposals) merely lays down that the salary will

Sec. not be varied during his term of office once it is fixed by the Act.
W.P. During the course of the proceedings before the Joint Parliamentary Committee, it was, however, suggested by Sir Samuel Hoare, the Secretary of State for India, that the Legislature should not be given the usual constitutional right of expressing no-confidence in a Minister by disallowing the item of the salary at the time of the discussion of the budget. The Secretary of State desires that a resolution directly expressing a vote of no-confidence in the Minister must be moved and passed for the purpose of calling upon him to resign his office. A half way measure, according to him, is not advisable at this stage of reforms. By this proposal, one of the constitutional weapons of compelling the Minister to resign, will be removed from the armoury.

312. Administrative Relation between the Federal Government and the units, i. e., the Provincial Governments: While exercising its executive power and authority it will be the duty of a Provincial Government to secure that due effect is given to every act of the Federal Legislature applicable to the Province. The Federal Government will also be authorised (1) to give directions to a Provincial Government, in that behalf and (2) prescribe the manner in which the latter's executive power and authority shall be exercised in any matter which affects the administration of a Federal subject. The Governor-General will also be empowered to use his discretionary powers and issue instructions to the Governor as to the manner in which the Provincial Government has to act for the purpose of preventing any grave menace to the peace and tranquility of India or any part thereof.

313. Break down of the Provincial Government: In para 248 *ante*, this subject has been discussed. (Para 44, Introduction.)

314. Ordinance by the Governor: His Special Legislative powers: The Governor will, also, be empowered to promulgate Ordinances. This subject will be discussed while considering the Proposals regarding the Provincial Legislature. (Para 103, Proposals.)

CHAPTER V

INDIAN LEGISLATION

INDIAN LEGISLATURE

63

315. Legislature: Technically, the Indian Legislature consists of the Governor-General and two Chambers, *viz.*, the Council of State and the Legislative Assembly. Ordinarily, a bill shall be deemed to have been passed by the Indian Legislature, if it is agreed to by both the Chambers.

316. The Council of State: The Council of State consists of not more than sixty members of whom thirty three are elected and the rest are nominated. Out of the non-elected members not more than twenty shall be official members and one must be a member nominated as the result of an election held in Berar. Sec. 63A

317. Feature of the Council of State: The original intention of the authors of the Report on the Indian constitutional reform was to create a Council of State which could be the supreme legislative authority in India on all critical questions and also a revising authority upon all Indian legislation. It was desired that this Council should develop something of the experience and dignity of a body of clever statesmen. With this view in mind, they proposed to keep an official majority in the Council of State and this Council was meant to help the Government in cases of emergency by passing the Bills which may have been thrown out by the legislative Assembly. Still, however, the Joint Select Committee of both the Houses of Parliament appointed to consider the bill (relating to this Act) did not agree entirely with the recommendations of the Mont-Ford Report, relating to the constitution of the Council of State. Their opinion was that there was no necessity to retain the Council of State as an organ for Government Legislation and they held that it should be constituted as a true second chamber from its very inception. They, however, agreed so far that this Chamber should be so constituted as to enable the Government to get the necessary piece of legislation passed in cases of emergency. The Indian Public, however, is not satisfied with the present composition of the Council of State, as they believe, and rightly, that it is a Government Section created with a view to carry out their arbitrary wishes, and consequently, is a big show and a burden on the Indian purse.

Special representation is given to Moslems, Sikhs and the European Commercial Community in the Council of State.

The Governor-General always nominates non-official members to complete the necessary strength of the Council. A nominated non-official member holds office for the duration of the Council of State or for such shorter period as the Governor-General may determine at the time of his nomination.

318. Duration and Session of the Council of State: Every Council of State shall continue for 5 years unless it is sooner dissolved by the Governor-General, or unless the period thereof is extended by the Governor-General, if in special circumstances he so thinks fit. After it is dissolved, the Governor-General shall appoint a date not more than six

Sec. months or with the sanction of the Secretary of State not more than
63D nine months from the date of dissolution, for the next session of that Chamber. The Governor-General may appoint such time and places for holding the session of the Council of State, as he thinks fit, and may also from time to time by notification and otherwise prorogue such session.

The president may adjourn any meeting.

All questions in the Council of State shall be determined, by a majority of votes of the members present, other than the President who shall give a casting vote in the case of a tie. The powers of this Chamber may be exercised notwithstanding any vacancy in the Chamber.

63A **319. President:** The Governor-General is empowered, to appoint
(2) President of the Council of State. Besides, the Governor-General is also empowered to appoint other persons to preside, in such circumstances as he may direct. Pursuant to this provision, at the beginning of every session the Governor-General nominates from among the members of the Council of State, a panel of not more than four Chairmen, any one of whom may preside over the Council, in the absence of the President. Such presiding member shall have all the powers of the President.

Anomaly: Of course, according to the scheme devised, the Government would like to have their nominee as the President of this Chamber. But, it would be a constitutional anomaly to have a President appointed by the Government. As will be seen hereafter, the Legislative Assembly and the Legislative Councils had nominated Presidents only during the period of transition and thereafter they have elected Presidents: but it is provided that this Chamber shall have a nominated President for all time to come under the present Act. It is really surprising that in the Chamber of Elder Statesmen with an official majority, it would not be safe for the Government to introduce the constitutional principle of an elected President. In Australia and the Union of South Africa, there is an elected President of the Second Chamber. It is provided in the Act, that the salary of elected President will be fixed by the various Legislatures; but we do not find any provision in the Act with reference to the salary of the President of the Council of State.

63(3) **320. Right of Address:** The Governor-General shall have the right of addressing the Council of State and may for the purpose require the attendance of its members.

63E **321. Membership:** An official shall not be qualified for election as a member of the Council of State and if any non-official member

accepts service under the Crown, his seat shall become vacant. Similarly, any member who becomes a member of the Legislative Assembly, his seat in the Chamber shall become vacant. If one is elected to both the Council of State and the Legislative Assembly, he shall have to elect between the two and signify in writing the Chamber of which he desires to be a member, and thereupon his seat in the other Chamber shall become vacant.

**Sec.
63E**

Every member of the Governor-General's Executive Council, shall be nominated as a member of only one Chamber of the Indian Legislature and shall have the right of attending in and addressing the other Chamber, but shall not be a member of both the Chambers. Also, he cannot vote in both the Chambers.

Member of the Executive Council: His right to take part in the proceedings: Sir B. L. Mitter, the permanent Law Member, had gone on leave and therefore he had, temporarily, vacated his seat both in the Executive Council and in the Legislative Assembly. He resumed his office in the Executive Council in November 1933 when the Legislative Assembly was in sessions at Delhi. Before he took oath and was formally sworn in, he took part in the proceedings on the floor of the House. A point of order was raised to the effect that the Law Member had no right to participate in the proceedings of the Assembly until he was formally sworn in and admitted as a member of the House, as required by the Rules. The President (Sir Shanmukham Chetty), however, ruled that an Executive Councillor has been, pursuant to sec. 63(4) of the Act, authorised to attend and address either **63(4)** Chamber.

With great respect to the Chair, the ruling seems to be doubtful. As contemplated by the section, an Executive Councillor should be first nominated as a member of any one Chamber of the Indian Legislature. After such nomination, he acquires the right of attending either Chamber; but such right is subject to the Standing Orders and Rules of the Legislature. The Rules provide that before a member takes part in the proceedings he should, formally, take oath. Unless all these provisions are strictly complied with, it is doubtful whether an Executive Councillor can validly take part in the proceedings.

Special interest represented: Special representation has been given to Mahomedans, Europeans, Sikhs and others.

322 Term of office: Elected members are entitled to continue to be members of the Chamber till the end of the life of the Chamber. Non-official nominated members are also ordinarily entitled to continue in office for the full period of the duration of the Chamber. A nomi. **63D**

Sec. nated official member can continue to be in office as the Governor General may determine.

63B **323. Indian Legislative Assembly: Composition:** The Legislative Assembly has a great significance in the constitutional history of our country. It consists of members nominated and elected in accordance with the rules made under this Act. At present, the Legislative Assembly consists of a hundred and forty four Members of whom a hundred and three are elected and the rest are nominated.

The Section is very elastic, inasmuch as the rules made under the Act provide for increasing the number of members of the Legislative Assembly and for varying the proportion which the various classes of members bear to one another, so that at least five sevenths of the members of the Legislative Assembly shall be elected members and at least one-third of the other members shall be non-official members.

324. In Other Countries & Dominions: It must have been noted that in the present Indian Legislative Assembly there are nominated official, nominated non-official and elected members. Whereas in England, Canada, Australia, South Africa and France, there are only elected non-official members.

63B **325. Right of Address:** The Governor-General shall have the right of addressing the Legislative Assembly and may for that purpose require the attendance of its members.

63D **326. Duration and Sessions of the Legislative Assembly:** The normal duration of every Legislative Assembly shall be three years from its first meeting. Other provisions as to duration and sessions are similar to those relating to the Council of State, which are discussed at pages 129 & 130 *ante*.

Whether President can fix the venue of the Sessions: An important legal question arose in November 1933. When the Legislative Assembly met at Simla, the President adjourned the Sessions upto November 1933 and fixed Delhi as the venue for the Sessions. When the Sessions was held at Delhi in November 1933, a point of order was raised contending that the holding of Sessions at Delhi pursuant to the order of the President was not valid. The contention was that sec. 63(d) provided that the Governor-General alone had the Power of authority to appoint such time and place for holding the Sessions; and therefore, the President was not competent to pass such orders. The Governor General had, however, before the meeting was held, passed the necessary orders and had complied with the provisions of sec. 63 (d). During the discussion on that point of order, Sir B. L. Mitter, the Law Member, agreed with the question raised but contended that the Gove-

Governor-General having issued the necessary orders under sec. 63D, the point of order did not arise. The President (Sir Shanmukham Chetty) agreed with the Law Member and over-ruled the point of order on that ground. He, however, made it clear that the President had no authority to fix the venue of the Sessions. **Sec. 63D**

Extention: In 1929, the Governor-General extended the life of the legislature.

Allocation: The elected members of the Indian Legislative Assembly are allotted to the different provinces as follows: Bombay 16, Madras 16, Bengal 17, the U. P. 16, the Punjab 12, Bihar and Orissa 12, the Central Provinces 5, Assam 4, and Delhi 1.

327. Nominated Members and Duration of their Office: A nominated member is either an official or a non official, nominated in the Assembly by the Governor-General. They hold their office for the duration of the Assembly or for a shorter period fixed by the Governor-General at the time of their nomination. **63B**

Members of the Viceroy's Cabinet are nominated as members in this Chamber of Legislature, as some of them are nominated in the Council of State, *i. e.*, some are nominated in the Upper Chamber and some in this Chamber. They have, however, the right to attend and address both the Chambers, but they have a right to vote only in the Chamber in which they are nominated. **63(4)**

The Governor-General is neither a member of the Council of State nor that of the Legislative Assembly but he has a right to address both the Houses as hereinbefore stated. **63(3)**

Special interest represented: Mahomedans, Europeans, Landholders, the Commerce, Sikhs, non-Europeans, etc., have got special representation.

328. President of the Assembly: The Joint Select Committee **63(C)** stated in its report that the President of the Legislative Assembly should be appointed by the Governor-General for the first four years. The qualification of such an appointed President was that he should have experience of the House of Commons and the knowledge of Parliamentary procedure, precedence and conventions. He should be the guide, philosopher and adviser of Presidents in various Provincial Legislatures. Thereafter, the President of the Legislative Assembly and the Presidents of various Local Legislatures should be elected from amongst the non-official members. These recommendations, as embodied in the Act, were carried out.

Sec. . He is a representative of the House itself in its powers, its proceed-
63C ings and its dignity.

Who can propose nomination : In the House of Commons of the British Parliament, it has been laid down that any Minister occupying the Treasury Benches can neither propose nor second the nomination of a candidate for the Chair. In 1925, a similar question arose in the Punjab Legislative Council. The then outgoing President admitted the principle of Parliamentary procedure but pointed out that nothing in the Rules or Standing orders rendered the nomination papers invalid.

President and Politics : Before a member is elected to the Chair he may belong to any political party in the House, but it is the established Parliamentary convention that he should cease to belong to any party as soon as he is elected to the Chair. This convention has been zealously followed by the occupants of the Presidential Chair. The late Mr. V. J. Patel was the first elected President of the House. On his election he had declared that he was no more a party man and had no connection whatsoever with any party in the House or outside. Sir Ibrahim Rahimtoolla and Sir Shanmukham Chetty, his successors, also followed the said convention. They also believed in and followed the constitutional maxim "the office of the Speaker has become a synonym with dignity and impartiality".

Parliamentary practice : It is a Parliamentary tradition that the newly elected President would pay a tribute to the retiring President. Mr. Patel and other Presidents in the Provinces did follow this Parliamentary practice when they were first elected to the respective Chairs in 1925. The same practice was also followed when fresh elections took place in 1926, when new Presidents were elected. However, when the then President vacated the Chair in 1930, neither the in-coming President, nor the Leader of the Opposition, nor the Leader of any other opposing party, nor the Leader of the House followed the long established Parliamentary practice.

63C **Deputy President :** There shall be a Deputy President of the
(2) Legislative Assembly who shall preside at meetings of the Assembly in the absence of the President and who shall be a member of the Assembly elected by the Assembly and approved of by the Governor-General.

The elected President and the Deputy President shall cease to hold office if they cease to be members of the Assembly. They may resign office and may be removed from office by a vote of the Assembly with the concurrence of the Governor-General. They shall receive such salary as may be fixed by an Act of the Legislature.

Powers of President: The President, the Deputy President, or the person presiding shall have the following among other powers: (1) To decide all points of order which may arise and his decision shall be final. Any member may at any time submit a *point of order* for the decision of the President. (2) To direct a member to discontinue his speech, where, notwithstanding his attention being called to it, he persists in irrelevance, or in tedious repetition of either his own arguments or of the arguments used by other members during the debate, and (3) to preserve order. To this end and to be able to enforce his decision on points of order, he can (a) direct any member whose conduct is in his opinion grossly disorderly, to withdraw immediately from the Council. Any member so ordered to withdraw shall do so forthwith and shall absent himself during the remainder of the day's meeting; if such a member is ordered to withdraw a second time in the same session, the President may direct him to absent himself from the meeting of the Council for any period not longer than the remainder of the session and the member so directed shall absent himself accordingly. (b) In case of grave disorder arising in the Chamber, the President may suspend any sitting for a time to be named by him.

Sec.
63C

His Rulings and various constitutional issues: Many interesting constitutional points often arose in the Indian Legislative Assembly. When (in April 1929) the Public Safety Bill was before the Legislative Assembly, Pandit Motilal Nehru, the then Leader of the Opposition, raised an important constitutional 'point of order' and invited the President to give his ruling thereon. In view of the Government's previous enactments, the President held that the Government could not proceed with the said Bill. The Government had to obey the President's ruling, which is always final; and the Viceroy had to use his special powers under sec. 72 of the Act and promulgate the Public Safety Ordinance.

Another important ruling of the President was invited by Pandit Madan Mohan Malaviya (in March 1930) on the question of the Traiff Bill and the *fiscal autonomy convention*. There were three points of order, viz., (1) whether it is for the President to interpret the fiscal convention, (2) whether the vote of the House is final and binding on the Government regarding fiscal matters, and (3) whether the Government members can vote on the fiscal convention. With reference to the first point, the President ruled that he had an authority to give the House an authoritative interpretation. With reference to the second point, the President said: "In the considered opinion of the Chair, the Government were not within their rights in taking up that attitude having regard to the terms of the convention. A free vote of the House

Sec. 63C is essential in all measures under the convention. It is therefore clear that the statement, that the Government (in case the amendment in opposition to the Government proposal was carried) would not proceed with the Bill, is not warranted by the constitutional position and is also calculated seriously to interfere with the free vote of the House.' On the 3rd point, Mr. Patel held that the official and nominated non-official members were entitled to vote.

Other questions relating to the *fiscal convention* are discussed at pages 61 to 65 *ante*.

The President and presence of the Member: The member who initiates the debate or on whose statement the debate is initiated, should remain present in the House either to reply or to give explanation at the end of the debate. The President had to refer to this convention when in 1929, the Commander-in-chief was absent from the Legislative Assembly.

The question of a similar nature occurred in the House of Commons on July 28th, 1930; (the case of Sandham)

At the August (1933) Sessions of the Assembly at Simla, the Speaker (Sir Shanmukham Chetty) ruled that even at the question hour, the member asking the question ought to remain present as the notice of question, puts the Government and its machinery to great trouble. Such absence, he said, ought to be deprecated.

President and the Precincts of the House: An important constitutional question arose on the Government's alleged right to get the inner precincts of the House (the Assembly building) guarded by the Police force on the ground that they were responsible for the safety of the President and the members. The proximate cause which led to the discussion of the said constitutional question was the throwing of a bomb from the gallery of the House while it was in session in 1930. The President contended relying upon the constitutional practice followed in England, that he was the Keeper of the House and it was within his rights to take such steps as may be found necessary for guarding the inner precincts of the House. On this dispute of conflicting rights, a Committee was appointed with a view to arrive at a satisfactory solution. It was thereafter decided to entrust the matter to the 'Watch and Ward' Committee of the House presided over by the President.

The Watch and Ward Committee sanctioned the appointment of ten men for internal policing. In spite of this, the Government posted various police-men in galleries and the inner precincts. On January

20th, 1930, the President announced that posting of police in galleries, etc., was a deliberate defiance of the President's orders and accordingly ordered the public galleries to be cleared off all persons until further orders. Accordingly, Sir Arthur Froom, a member of the Council of State, who then happened to be in the gallery had also to vacate it. It is now settled that there shall be 'watch and ward' officers under the control and superintendence of the President assisted by a previously fixed number of policemen, to guard the inner precincts of the Assembly building. If one looks to the precedents of Parliament, the Speaker has got the right to decide what steps should be taken to guard the inner precincts of Parliament. The British Cabinet does not claim that right. The President was, therefore, constitutionally justified in raising and settling the said issue.

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Assembly Secretariat: Till 1930, the Assembly had no separate Secretariat but its Secretariat staff was under the direct control of the Government. The then President of the Assembly pointing out the anomalous and unconstitutional position, raised the question that there should be separate and independent Secretariat attached to the Assembly and under the direct superintendence and control of the President. The said question was settled and the Assembly Secretariat was separated from the Legislative Department and placed under the direct control and superintendence of the President.

Right to expel: The President has got the right to expel any one from the Press Gallery who commits contempt of the Chair on the necessary motion being brought. The President was called upon and had to exercise these powers at the January (1930) Sessions.

Though only one incident occurred in a Provincial Legislature, it is worthy of note at this place as it lays down a principle. At the Poona Sessions of the Bombay Legislative Council in August 1933, one member made a serious allegation against the Education Minister (Diwan Bahadur S. T. Kambli). The Chair called upon him to withdraw that allegation. On his refusing so to do, he was expelled from the House for the day.

'Catching President's eye' A member desiring to address the House must rise in his place and keep standing until the President gives him permission. If more members than one get up simultaneously to speak, the President would be guided by the desire of the House. At the same time, the President is entitled to give priority to one who has first caught the President's attention. The member desiring to speak should therefore be vigilant to try to catch the President's attention, technically called 'catching the President's eye'. A claim for priority is

Sec. 63C not a matter for argument. If, however, a member has been mentioned by another, during the debate, he will, as a rule, be given priority in speaking next. Except under such circumstances the rule of rising and 'catching the President's eye' prevails.

President *vis-a-vis* the Executive: As soon as the President is elected, constitutionally he becomes a non-party man. "It was a tacit, ancient and invariable practice of the House of Commons for the Speaker and the Deputy Speaker to be above all controversy when once they had accepted the office". When Mr. Patel was first returned to the Assembly he was returned on the Congress Ticket. During the life of the second Assembly under the Reforms, the question of electing the President arose. Mr. Patel was elected to the Chair. After taking the Chair, he explained the constitutional position and declared that he would, thenceforth, be a non-party man. That Assembly was dissolved in 1926. At the general election in that year he sought election on an independent ticket and as a non-party man. After 1929 and early in 1930, the Indian National Congress called upon the members to resign; and, Mr. Patel though pressed, refused to resign on the constitutional ground that he was a non-party man.

In April 1930, he offered his resignation and addressed a letter to the Viceroy giving reasons for his action. By his said letter, he made the position of the President *vis-a-vis* the Executive very clear. He wrote, amongst other things, that he had in his conduct of the Chair observed strict impartiality and absolute independence and was not actuated on any occasion by any personal or political feeling. His unflinching adherence to the (said) two principles brought down on his head the wrath of the bureaucracy....."Persecution was my lot at least for the last three years. The Chair has been a bed of thorns for me all throughout. They went to the length of organising and carrying out social boycott of the President of the Assembly. They condoned all sorts of attacks in the Press and otherwise on the impartiality of the Chair.....They tried to undermine the authority of the Chair—a clique of underlings determined on a campaign of vilification, abuse and misrepresentation of the President was allowed to thrive.....My movements have been constantly watched and I had been shadowed".

329. Definitions: Session: Session means the sittings of the House until it is prorogued or dissolved. There are various sessions, e. g., Winter Session, Summer Session, and Autumn Session.

Adjournment: Adjournment is a continuance of the session from day to day after short intervals. Such adjournment does not end the continuance of the session.

Prorogation : When the session is adjourned from one session to the other it is said to have been *prorogued*. Prorogation puts an end to the continuance of the session but does not end the life of the Assembly. Sec. 63C

Dissolution : Dissolution or dismissal of the House means the civil death of the House. The Legislature ceases to be in continuance and a new one must be formed by fresh elections.

330. Legislative Procedure : It is already noted under sec. 63 of the Act that ordinarily a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both the Chambers either without amendments or with such amendments only as may be agreed to by both the Chambers. A Bill so passed requires *assent* of the Governor-General before it becomes Law. A Bill may be introduced in either Chamber, and after it is passed by the originating Chamber it is referred to the other Chamber. If the latter passes the said Bill without amendments, the former shall be informed of the same; but if the other Chamber passes the original bill with amendments it shall be returned to the originating Chamber to consider the amendments and to concur with the same. On the former, disagreeing with the amendments the bill is allowed to be lapsed or the fact of disagreement is submitted to the Governor-General. 23

Difference : There is some difference between the British Parliamentary and the Indian Legislative Procedure. The first reading of a Bill in the Indian Legislature is equivalent to the second reading of a Bill in the House of Commons. The British Parliamentary procedure is explained in the second part of this treatise.

331. Joint sitting of both Chambers: Where the fact of disagreement has been reported to the Governor-General, the Governor-General shall within six months after the passing of the Bill by the former Chamber, *convene joint sittings* of both the Chambers. The President of such joint sittings is the President of the Council of State and the same procedure as far as possible applies. In such a joint sitting all members would vote together on the amendment. If the amendments are affirmed by a majority of votes of the members present of both the Chambers at such sitting, the Bill, with the amendments, shall be deemed to have been passed by both the Chambers.

332. Procedure after a Bill is passed by both Chambers : After a Bill is passed by both the Chambers of the Indian Legislature, the Bill goes to the Governor-General who may (1) give his assent to it, and upon such assent given, it becomes an Act, and takes effect on the day 68

Sec. 68 specified by him or otherwise immediately, or (2) return it to either Chamber for re-consideration. After the bill is re-considered by both the Chambers in light of the Viceroy's recommendation it is again sent to the Governor-General who may give his consent; or (3) withhold his assent in which case the Bill does not take effect. If both the Chambers have refused to reconsider the Bill as desired by him, he may withhold his assent in that event also; or (4) reserve the Bill for the signification of the Crown's pleasure thereon. The Bill becomes an **Act** when the Crown signifies his assent and when the Viceroy notifies that assent. The Crown is empowered to disallow Acts of Indian Legislature (*i. e.*, passed by both Chambers and assented to by the Viceroy). If the Act is so disallowed, it ceases to have effect from the date notifying disallowance.

67B **333. Powers of Certification : Procedure for extraordinary essential Government Legislation :** If one Chamber passes a certain Bill but the other refuses to do so, or if one Chamber refuses even leave to introduce the Bill as recommended by the Governor-General and the Governor-General expresses his opinion that the passage of the Bill is essential for the safety, tranquility and public interest of British India or any part thereof, and if the Governor-General certifies to this effect, (1) the Bill shall be considered to have been passed by both Chambers and assented to by the Governor General, notwithstanding the same having been thrown out by one Chamber; and (2) the bill would be placed before the other Chamber and if that Chamber passes the Bill, it shall be considered to have been passed by both Chambers though assented to by one chamber. The Bill does not take effect, immediately after the above procedure has been followed ; in both the cases an Act so passed, should first be laid for at least eight days before both Houses of Parliament; thereafter it is presented to the Crown for approval. After such assent is signified by the Crown, the Act would become the Law of the Land.

If the Viceroy feels that the Act is so urgent and essential that for the sake of public safety, tranquility and interest, no time could be allowed in going through the ceremony and procedure of obtaining the Crown's assent, the Viceroy is empowered to declare the Act passed on his own responsibility by the process of certification and the Act shall come into operation immediately. But His Majesty-in-Council can subsequently disallow it if it is found by them that the same is not proper.

334A. White Paper: Governor-General's Powers of Certification to be replaced by 'Governor-General's Act': The details of the Legislative procedure as proposed in the White Paper will be discussed at the

end of this Chapter. Suffice it to observe for the present, that the provision regarding the Governor-General's powers of certification will be repealed and the Governor-General will be empowered at his discretion to enact 'a Bill recommended by him to both Chambers of the Federal Legislature, as a 'Governor-General's Act,' either with or without any amendment made by either Chambers. The Act so enacted will have the same force and effect as an Act of the Legislature, and will be subject to disallowance in the same manner; but the Governor-General's competence to legislate under this provision will not extend beyond that of the Federal Legislature as defined by the Constitution Act. It is accordingly proposed that measures enacted by the Governor-General without the consent of the Legislature should be described as "Governor-General's Act", and that a special form of "enacting words should be employed to distinguish them from Acts enacted by the Governor-General by and with the consent of both Chambers of the Legislature." It will be specifically mentioned that such an Act is enacted on the Governor-General's own responsibility. (Paras 42 and 43, Proposals; Para 37, Introduction.)

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67B**

Some points of Procedure : When a member in charge of a bill asks for leave to introduce it, none can discuss the principle embodied therein. The principle of the bill can only be considered, at the time of a motion for consideration. However, one can do so only if he opposes the bill.

Reference of a bill to the Select Committee does not necessarily commit the Legislature to the principle of the bill.

334. Motion for 'Adjournment' : A motion for an adjournment of business of either Chamber for the purpose of discussing a definite matter of urgent importance may be made with the consent of the President and subject to the previous allowance by the Governor-General (if there is sufficient time to obtain the Governor-General's allowance). The President *shall* not refuse his consent, except for reasons which would justify him to disallow a resolution. The Governor-General, also, would not ordinarily disallow the motion for adjournment unless he feels that the discussion on the proposed motion would be detrimental to public interest.

335. Freedom of Speech : Subject to the Rules and Standing Orders that may be made, Members of both Houses shall have complete freedom of speech when made on the floor of the House and no member shall be liable in any Court of Law by reason of his speech or vote, in either Chamber. He is, similarly, not liable by reason of anything contained in any report of the proceedings. The rules in this

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Sec. behalf are made by the Governor-General in Council with the consent
67(7) of the Secretary of State and the approval of Parliament.

"The Members are not given the same freedom of speech as is enjoyed in England, France, Germany, etc., because the Standing Order lays down the following restrictions :

"A member while speaking shall not (i) refer to any matter of fact which is *sub-judice* (i.e., pending under judicial decision) ; (ii) make a personal charge against a member ; (iii) make use of offensive expressions regarding the conduct of the Indian or any Local Legislature ; (iv) reflect upon the conduct of the Crown or the Governor-General or any Governor or any Court of Law in the exercise of its judicial functions ; (v) utter treasonable, seditious or defamatory words ; or (vi) use his right of speech for the purpose of wilfully and persistently obstructing the business of the Council."

A member is held liable for his speech if he causes publication of his speech ; in such a case, "privilege" is forfeited.

If a member uses any unparliamentary expression or if he speaks on matters which are not strictly relevant to the subject before the House, he may be promptly *called to order* and may be even censured by the House and thereupon he may be obliged to offer an explanation or apology. If he persists in irrelevant or tedious repetitions he may be directed by the President to discontinue his speech.

Member's speeches : Press : Press Ordinances : In 1932, the Press Ordinance was promulgated re-enacting the Press Act of 1910, with some more rigorous provisions. Even Sir Lawrence Jenkins was shocked by the provisions of the Press Act of 1910. However, the question arose in February 1932, whether the press should be penalised for publishing any speech made by any member of the Legislature on the floor of the House. Sir James Crerar, the then Home Member, opined "the press could be so penalised, as protection to members for their speeches did not extend to their publication". On this contention, the Speaker of the House called upon the Law Member to assist the House by expressing his opinion. He said 'in my opinion the Ordinance has made no change in the ordinary law of the land in the matter of publication in the press or otherwise of the proceedings of the Legislature'. This opinion was interpreted by the Speaker as meaning that under the Press Ordinance the powers of the Press were not curtailed.

An important judgment was delivered by Full Bench of the Calcutta High Court on a point arising under the Press Ordinance.

Their Lordships (The Hon'ble the Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Panckridge) observed, *inter alia*, that the paper ("The Advance") had given publicity to the views of a particular individual only as a news item, pure and simple, without associating itself with it in the least through its editorial comments; as such, a mere publication of that item did not come within the mischief of the Indian Press Emergency Act, under which the security had been demanded. Accordingly, their Lordships set aside the order of the Presidency Magistrate demanding security from the press.

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336. Supplementary Provisions: Subject to the provisions of this Act provision may be made by rules under this Act as to (a) the term of office of nominated members of the Council of State and the Legislative Assembly; and the manner of filling casual vacancies occurring by reason of absence of members from India, inability to attend duty, death, acceptance of office, or resignation duly accepted, or otherwise; (b) the conditions under which and the manner in which persons may be nominated as members of the Council of State or the Legislative Assembly; (c) the qualifications of electors; the constitution of constituencies and the method of election for the Council of State and the Legislative Assembly and any matter incidental or auxiliary thereto; (d) the qualifications for being nominated or elected as members of the Council of State or the Legislative Assembly; (e) the final decision of doubts or disputes as to the validity of an election; and (f) the manner in which they are to be carried into effect.

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Subject to any such Rule any person, who is a Ruler or subject of any State in India, may be nominated as a member of the Council of State or the Legislative Assembly.

337. Election Petition: When a candidate at any (general or bye) election, feels himself aggrieved, he may petition to the Governor-General questioning the validity of the said election within 14 days of the date of the publication of the result of such election in the Official Gazette; such a petition is known as an election petition. The petitioner is required to deposit Rs. 1,000/- with his petition. The Governor-General thereupon appoints three Commissioners (who are, or have been or are eligible to be appointed judges of a High Court) to inquire into the subject-matter of the petition. Such an inquiry shall be conducted as in a Court of Law. On the Commissioners submitting the report to the Governor-General, he shall pass orders in accordance therewith.

338. Powers of Indian Legislature: Division of powers: The powers of the Indian Legislature can be divided into 3 heads; Powers

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Sec. 65 regarding (i) legislation, (ii) budget and (iii) interpellations, resolutions, etc.

67 It should be noted that the aforesaid provisions provide in what matters the Indian Legislature have powers to make laws and in what matters they have not. It has been further provided by section 67 of the Act that it shall not be lawful without the previous sanction of the Governor General to introduce at any meeting of either Chamber of the Indian Legislature any measure affecting (a) the public debt or public revenues of India, or imposing any charge on the revenues of India; or (b) the religion or religious rights and usages of any class of British subjects in India; or (c) the discipline or maintenance of any part of His Majesty's Military, Naval or Air Forces; or (d) the relations of the Government with foreign Princes or States; or any measure (i) regulating any provincial subject or any part of a provincial subject, which has not been declared by rules under this Act to be subject to Legislation by the Indian Legislature; or (ii) repealing or amending any Act of a Local Legislature; or (iii) repealing or amending any Act or Ordinance made by the Governor-General.

339. Legislative powers: The Indian Legislature has powers to make Laws (a) for all persons, for all Courts, and for all places and things within *British India*; (b) for all subjects of His Majesty and servants of the Crown *within other parts of India*; (c) for all Native Indian subjects of His Majesty, *without and beyond as well as within British India*; (d) for the Government Officers, Soldiers, Airmen and followers in His Majesty's Indian forces wherever they are serving in so far as, they are not subject to the Army Act, or the Air Force Act, (e) for all persons employed or serving in or belonging to the Royal Indian Marine Service and (f) for repealing or altering any law which for the time being is in force in any part of British India or applies to persons for whom the Indian Legislature has power to make Laws

65(2) The Indian Legislature has not power, unless expressly so authorised by an Act of Parliament, to make any Law repealing or affecting (i) any Act of Parliament passed after the year 1869 and extending to British India; and any Act amending the same or (ii) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India; and has not power to make any law affecting the authority of Parliament, or any part of the unwritten law, or the constitution of the United Kingdom of Great Britain and Ireland, or affecting the Sovereignty, or dominion of the Crown over any part of British India.

The Indian Legislature *has not power*, without the previous appro

val of the Secretary of State in Council, to make any law empowering any Court, other than a High Court to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any High Court.

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White Paper: Proposals: In paras 110, 111 and the subsequent paras of the White Paper, the proposed powers of the Federal and Provincial Legislatures have been laid down. The same will be considered at the end of this Chapter while discussing the proposed Federal Legislature.

340. Case Law: The Indian Legislature can limit the liability of the Government for loss or damage caused by its servants, such a provision is not *ultra vires* of the Legislature. *Maung Po Kyi vs. Secretary of State*, 3 Bur. L. T. 150. Any enactment which adds to or takes away from the liability of the Secretary of State in Council is *ultra vires*. *A. M. Ross vs. Secretary of State*, 47 Mad. 55. Even the exercise of jurisdiction of a High Court under the Charter Act in British India is subject to the general legislative powers of the Governor-General in Council. 4 Cal. 172. 1828 Sindh 149. The 'person' as used in section 65 includes any body of persons corporate or incorporate. 1930 A. L. J. 579. If a party has a cause of action against the East India Co their right cannot be taken away by any Act passed after 1858. 23 Bom. L. R. 492; (1861) 5 Bom. H. C. R. Appx A; 15 Bom. L. R. 27; 22 Bom. L. R. 607; 40 Cal. 49; 45 Bom. 1167. Similarly, the Secretary of State in Council is liable to be sued, but a tort is not such a liability. 24 Mad. L. T. 111; 3 S. L. R. 59. The Indian Legislature can invest the High Courts with the original jurisdiction even in cases which do not strictly arise within the limits of their original jurisdiction. 39 Mad. 1085; 20 Mad. L. J. 382. Rights to personal freedom and property are the rights referred to in the phrase "*unwritten laws*" in section 65 (2) of the Act. 6 B. L. R. 392; 40 Cal. 391; 39 Mad 1085.

341 Viceroy's Special power Regarding Legislation: When in either Chamber of the Indian Legislature any bill has been introduced or is proposed to be introduced or any amendment to a bill is moved or proposed to be moved, the Governor-General may certify that the bill or any clause of it or the amendment affects the safety or tranquility of British India or any part thereof and may direct that no proceedings or further proceedings shall be taken by the Chamber in relation to the bill, clause, or amendment and effect shall be given to such direction.

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(2a)

It has already been discussed in what case the joint sitting of both Chambers could be convened.

Sec. 67 Without prejudice to the powers of the Governor-General under section 58 of this Act, the Governor-General may, where a bill has been passed by both Chambers of the Indian Legislature return the bill for reconsideration of either Chamber.

We have already dealt with the extra ordinary powers of the Governor-General in case of urgency.

Proposed Governor-General's Act: In para 334A *ante* the Proposal in the White Paper regarding the Governor-General's Act has been referred to.

67A 342. Powers Regarding Indian Budget: *Indian Budget:* The estimated annual expenditure and revenue of the Governor-General in Council, commonly known as Budget, is laid in the form of a statement before both Chambers of the Indian Legislature every year. The proposals of the Governor-General in Council for the appropriation of the revenue or money, *except relating to certain heads*, which shall be noted hereafter, shall be submitted to the vote of the Legislative Assembly—but not to the vote of the Council of State—in the form of demands for grants. The Legislative Assembly may assent to any demand or may move any '*cut*' and successfully carry the same and thereby reduce the amount referred to in any demand or may refuse the whole grant.

Non-votable Grants : We have above referred to certain heads with reference to which the Legislative Assembly can give its assent or withhold the same for the purpose of expenditure, but there are certain heads with reference to which the Legislative Assembly has no voice unless the Viceroy otherwise directs. These heads are called non-votable grants: (1) Interest and sinking fund charges on loans; (2) expenditure of which the amount is prescribed by or under any Law; (3) salaries and pensions of persons appointed by or with the approval of the Crown or the Secretary of State in Council; (4) salaries of Chief-Commissioners and Judicial Commissioners; and (5) expenditure classified by the order of the Governor-General in Council as (i) ecclesiastical, (ii) political and (iii) defence.

Difference of opinion as to whether a certain item falls under the votable or non-votable head shall be settled by the Governor-General and his opinion shall be final.

343. Procedure: The changes brought about by the Minto-Morley Reforms regarding the decision of the year's finance were briefly these: (1) that the discussion extended over several days instead of one or two; (2) that it took place before the Budget was finally settled; (3) that the members got the right to propose resolutions and to divide the councils upon them. The procedure, according to the Rules made,

was as follows : At the first stage a "financial statement" (meaning thereby a preliminary financial estimate prepared by the Government for the next year), was presented with an explanatory memorandum. Thereafter some time was given to the members to study both the financial statement and the explanatory memorandum. Then, a day was appointed for considering the said financial statement. On the first day so appointed, a general discussion on the financial statement followed. The members had the liberty of offering general observations both on principle and on the statement. After the general discussion was over, there was a second stage for the discussion thereof. That stage began by the statement of the Finance Member explaining Government Financial Statement. Resolutions were then allowed to be moved thereon. The second stage was over when those resolutions were disposed of. At the third stage a Councillor in charge of the department would explain heads or the heads of the financial statement relating to his department. Resolutions then followed on such head or heads.

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67A

The Budget, *i. e.*, the official statement was required to be presented to the Imperial Council on or before the 24th of March. If the Government had accepted any of the resolutions, and if consequently, any change was made in the financial statement, the Finance Member would explain the same and would also explain why a resolution was not accepted.

The rules were also made for allowing discussion on matters of general public interest.

The rules also provided for asking questions and for putting supplementary questions for the purpose of further elucidating the facts regarding which a request for information might have been made in the original question.

The budget is first circulated amongst the members and then the Government makes "demands" under each head which is votable. Such heads contain several items and they are accordingly considered by the House; members are at perfect liberty to criticise the said expenditure. Motions for reduction more commonly known as 'cuts' are moved and put to vote. These questions are decided by a majority of votes of the members present. The Legislative Assembly only has got these powers. After the demands are voted by the Legislative Assembly, they are submitted to the Governor-General in Council. If the Governor-General declares that he is satisfied that any demand which has been refused by the Legislative Assembly is essential to the discharge of his responsibilities, he shall act as if it has been assented

Sec. to, notwithstanding the withholding of such assent or the reduction of
67A the amount therein referred to by the Legislative Assembly.

Notwithstanding anything in this section (*i. e.*, 67A) the Viceroy is empowered in cases of emergency to authorise such expenditure as may in his opinion be necessary for the safety or tranquility of British India or any part thereof. These extraordinary powers of the Viceroy are known as *powers of certification*.

These powers of certification have been conferred on the Viceroy on the ground that at the present stage, the principle of full responsible government is not yet introduced. It is urged that such extraordinary powers shall be removed while re-considering the present Act.

344. Constitutional Issue: A Finance Act is required to be annually passed for the purpose of levying and recovering certain taxes. The official year is from 1st April to 31st March of the next year. As hereinbefore explained, after discussions on the budget are over, a finance bill is introduced. Such a finance bill could either be accepted or thrown out *in toto*. If this new finance bill is not passed into an Act before 31st March, unless special measures adopted, it would be illegal for the Government to recover certain taxes.

An interesting constitutional dead-lock was anticipated in March 1929. It was then anticipated that the finance bill would not be passed before March 31st, 1929. Three courses were then open to the Government: Firstly, to accept the Salt Tax reduction; the second alternative was for the Viceroy to recommend the bill and send it to the Assembly immediately in the recommended form. That course would have, with an all night sitting of the Assembly, enabled the bill to become law before March 31st. The third course was to let the bill be passed in the normal way and be dealt with by the Council of State; but under that process the Viceroy would have been obliged to promulgate an Ordinance embodying the said bill.

Interesting political developments, subsequently, arose and the things got themselves adjusted.

71,72 345. The special legislative Powers of the Viceroy: Regulations: Though the Indian Legislature has been formed with powers to make laws, etc., yet the Viceroy in Council are empowered with extraordinary powers to make *Regulations*. A "Regulation" is distinct from an "Act." Acts are pieces of legislation and they are called laws. Regulation is a measure not passed by the Legislature but is a measure amounting to law passed by the Executive Government.

The Local Government of any part of British India to which sec. 71 is made applicable for the time being may propose to the Governor-General in Council the draft of any Regulation for the peace and good government of that part with the reason for proposing the Regulation. Thereupon, the Governor-General in Council may consider the said proposals; *upon the Viceroy assenting to the same, it shall be published in the Gazette of India and the local Official Gazette (if any).* Upon such publication, the said measure gets the like force of law and is subject to the like disallowance as if it were an Act. The Governor-General must immediately thereafter send an authentic copy of every such Regulation to the Secretary of State in Council. The Secretary of State may, by a resolution in the Council, apply these provisions to any part of British India or by such resolution may withdraw the application of such provision.

346. Ordinances: When the Viceroy in Council act upon the motion of the Local Government and pass a measure, that measure is called a Regulation; but when the Viceroy acts on his own initiation and promulgates such a measure it is known as Ordinance. The Viceroy may, in case of emergency, make and promulgate Ordinances for the peace and good government of British India or any Part thereof and any Ordinance so made shall, for the space of *not more than six months* from its promulgation, have the like force of law as an Act passed by the Indian Legislature. But the power of making Ordinances is subject to the like restrictions as that of the Indian Legislature to make Laws, and any Ordinance made under this provision is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superceded by any such Act.

Origin : Aims and Objects : The origin of this section could be traced to section 23 of the Indian Councils Act, 1861 (24 & 25 Vict. ch 67). By the said section similar powers were given to the Governor-General. The said provision is embodied in almost similar terms in section 72 of the present Act. The said power was given to the Governor General when there was some chaos and unsettled state in the country. The Legislative Council was merely in a stage of formation and there was neither a full-fledged legislature nor a representative nor a responsible form of government. There were certain other forces also ; the chaos prevailing in the country required the Governor-General to be armed with such special powers to meet immediate emergency. Now, when there are full-fledged Legislatures and there is an established Government in the country, it is a question whether there is any necessity of such powers.

Even when the India Council Bill (1861) embodying such a provi-

Sec. 72 sion was on the anvil of Parliament, it was stated by Sir Charles Wood, the then Secretary of State for India, while piloting the said Bill in the House of Commons : "The Bill also gives powers to the Governor-General in cases of emergency to pass an Ordinance having the force of law for a limited period. Question might arise about the Arms Act or the Press Act as to which it would be very injudicious that delay should occur ; and we, therefore, propose to empower the Governor-General on his own authority to pass an Ordinance having the force of law to continue for a period of 6 months, unless disallowed by the Secretary of State or superceded by an Act of the Legislature ". Lord Ellenborough, while speaking on the said provisions expressed his views as follows : " It is now proposed that the Governor-General should be enabled to make an Ordinance which for a limited period of time should have the effect of Law. This opens a question of gravest constitutional importance. The Law had been that whatever executive power might be granted to the Governor-General, he should have no legislative powers without the concurrence of his Legislative Council. It was the Magna Charta of India. It has been adhered to throughout and beneficially. I am unwilling to trust, except under peculiar circumstances of emergency to any individual man whatever, however much I may respect him or whatever personal confidence I might place in him, the absolute power of making a law to bind a great Empire, not only without the concurrence of his Legislative Council but perhaps even without having consulted them."

Such an expression of opinion by those who were responsible for introducing such a provision for the first time show very clearly that the Viceroy was empowered with such extraordinary powers only to meet such emergency as expressed by the then Secretary of State. It was not at all necessary (it can be safely contended) to meet any situation which may arise out of any political propaganda. Moreover, it was also anticipated that such emergency was only to continue for the maximum period of six months; in no way it was contemplated that the Viceroy was getting the powers of renewal even. He was expected to submit the proposals to the Legislature at the earliest possible opportunity, if he desired the Ordinance to continue even for the full period of six months. The spirit of the provision seems to find a remedy to meet an 'emergency' which might arise when the Legislature may not be in session. The last portion of sec. 72 contemplates a shorter life of the Ordinance; in no event, it contemplates its renewal. It may be contended that the wording of the section is not definitely clear either way; but in that event, the spirit of the section should guide and control the construction of the section; and the spirit, certainly, seems to be contrary to the re-promulgation of Ordinances.

Public Safety Ordinance of 1929 is referred to hereinbefore.

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347. Various Ordinances of 1930: Ordinance I of 1930, Bengal Criminal Law Amendment Ordinance (19-4-30). Ordinance II of 1930, Indian Press Ordinance (27-4-30). Ordinance III of 1930, Lahore Conspiracy Case Ordinance (1-5-30). Ordinance IV of 1930, Sholapur Martial Law Ordinance (15-5-30). Ordinance V of 1930, Prevention of Intimidation (Picketing) Ordinance (30-5-30). Ordinance VI of 1930, Unlawful Instigation (No-tax) Ordinance (30-5-30). Ordinance VII of 1930, Unauthorised News-sheets and Newspapers Ordinance (2-7-30). Ordinance VIII of 1930, Peshawar Martial Law Ordinance (15-8-30). Ordinance IX of 1930, The Unlawful Association Ordinance (10-10-30). These were the Chief Ordinances promulgated by the Viceroy in pursuance of the powers vested in him under section 72.

Opinion is divided on the point whether some of these Ordinances are constitutionally justified.

Some of the Viceregal Ordinances came up before the Bombay High Court for discussion in recent cases.

Sholapur Martial Law Ordinance was first brought before the said Court on an application for the issue of the writ of Habeas Corpus on behalf of *some of the persons who were sentenced by the Military Court at Sholapur*. The Bench which heard the said application consisted of three Honourable Judges of the said Court, namely, the Chief Justice, Mr. Justice Madgaoker and Mr. Justice Blackwell. All the learned judges gave different judgments but the result was in effect the same. According to the Chief Justice, all that the Court could do was to consider whether there was any evidence upon which the Viceroy could have considered whether an emergency had arisen. The Court could not substitute its own appreciation of the sufficiency of that evidence in place of the discretion of the Viceroy. It was therefore not necessary to determine whether the promulgation of martial law in Sholapur was justified. According to Mr. Justice Madgaokar, the responsibility to consider whether there was an emergency or not is placed under sec. 72 upon the Viceroy and not upon the Court; but, in his opinion, the said power could not be said to violate the liberty of the subject. He also expressed the view that the arguments cannot be based on the English Constitutional Law which is different in that behalf from the Indian Constitutional Law; there is no analogy between the two. In England also, the Defence of the Realm Act existed giving arbitrary powers to the executive in cases of 'emergency'; and therefore

Sec. 72 sec. 72 cannot be said to be strictly unconstitutional. The learned Judge did not agree with the arguments of the Advocate-General and opined that the civil authorities must make it clear that a state of war exists before the civil authority of the Government handing over the same to the control of the military authority. There must also exist the necessity of abolition of the ordinary courts. According to him, court had the right to consider the question of necessity. He also added that the man on the spot was not endowed with super-human attributes; he may exaggerate a mere riot into an armed rebellion. The abdication of the civil authority was not the first, but it was really the last stage. He, therefore, opined that it was for the Crown to prove the necessity of martial law. Mr. Justice Blackwell expressed almost the same view. However, in Bhagatsing's case the Privy Council held that the Viceroy was the sole judge of an 'emergency'.

The other question before the court in that behalf was whether the court could 'revise' the orders and sentences. The court held that the military court under the Ordinance was not the 'court' as contemplated by the Criminal Procedure Code and therefore the same could not be revised.

There was one very important question with reference to the said Ordinance. It was "whether the Viceroy can give indemnity in the Ordinance itself and whether that part of the Ordinance was *ultra vires*?" This important question was not raised and therefore there is no adjudication thereon. According to the ordinary constitutional procedure, the legislature should be called upon, after the expiry of the Ordinance, to pass an Act of Indemnity. Such indemnity ought to be given, it is submitted, by an Act of Legislature and not by the Ordinance. If an Indemnity Bill is brought before the Legislature, it gives an opportunity to discuss the acts of the executive. The incorporation of 'indemnity' in the Ordinance itself deprives the Legislature of such an opportunity. Apart therefrom, it is a question whether such an incorporation is constitutional. Another question is whether the 'indemnity' contained in the Ordinance which lapses after six months, will also lapse with it or survive the said Ordinance. It is submitted that legally an Act of Indemnity is necessary. There was the Mopla Riot in Malabar which was followed by the declaration of martial law which was embodied in an Ordinance which was somewhat similar to the Sholapur Martial Law Ordinance. An Act of Indemnity was subsequently passed by the Indian Legislature. 'Indemnity' was not then incorporated in the Ordinance itself.

The other Ordinance before the court was one generally known as the 'Picketing Ordinance'. One Mrs. Lukmani had posted herself before

a liquor shop with a view to dissuade intending customers from 'drinking; the magistrate held that the accused was 'loitering' and from that fact he concluded that it was with a view to 'molest'; thereupon, he convicted and sentenced her under the Ordinance. This case was brought before the High Court on the ground that the mere fact of 'loitering' did not necessarily prove the intention to 'molest' the shopkeeper or his customers and did not prove any 'offence' as contemplated by the Ordinance. Three important principles were laid down by the court (Madgaonker and Barlee, JJ.) namely (1) 'peaceful' dissuasion' is not 'molestation,' (2) 'apprehended' loss to the shopkeeper is not 'molestation,' and (3) unless there is 'molestation' as defined in Sec. 3, the Ordinance did not apply. Mr. Lukmani was acquitted and ordered to be released.

Various Ordinances of 1930, 1931 & 1932: Various Ordinances were made and promulgated by the Viceroy in the years 1930, 1931 and 1932 to meet the unconstitutional propaganda and programme of the Indian National Congress.

Some of these Ordinances also came up before the Bombay High Court for discussion in recent cases.

Case Law: In the "Emergency Powers Ordinance" provision was made that the Governor-General in Council and the Local Government may apply the said Ordinance or a part thereof to any particular Province. In *Re: Phansalkar*, it was contended that such a provision amounted to 'delegation' of the powers by the Viceroy to another body. It was further contended that the Viceroy alone was the sole judge of the emergency as decided in *Bhagatsing's case*, (33 Bom. L. R. 950) and therefore, if it was left to any other body to *apply* the Ordinance it amounted to 'delegation' of the judgment to decide whether there was sufficient emergency which necessitated the application of the Ordinance. It was contended on behalf of the Crown that the said provision did not amount to any 'delegation' but it merely provided the administrative machinery. The Advocate-General relied upon 4 Cal. 172 and 5 I. A. 178. The Court (Beaumont C. J., Broomfield and Nanavaty JJ.) held that such a provision did not amount to any 'delegation' but merely laid down the administrative machinery. They therefore held that the Ordinance was validly promulgated under sec. 72.

The said case (4 Cal. 172) was under section 22 of the Indian Councils Act, 1861 and was not under section 23 of the said Act which alone is similar to sec. 72. This fact and other observations of their Lordships were not pointedly brought to the notice of the Court during the course of arguments.

348. Other Questions: whether constitutional & *Ultra Vires*:

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Various other constitutional and legal questions were not raised before the said Full Bench of the Bombay High Court during the course of the of the argument on behalf of the petitioner in the said case. The important question is whether the said Ordinance is *ultra vires* of section 65 (clause 2) and of the Royal Proclamations of 1858 and 1919. Section 65 (2) runs as follows: "That the Indian Legislature... has not power to make any law affecting the authority of Parliament or any parts of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown." The attention must also be invited to H. M. the Queen's Royal Proclamation of 1858. It *inter alia* states: "We hold ourselves to the Natives of our Indian Territories by the same obligations of duty which bind us to all our other subjects and those obligations, by the blessing of Almighty God, We shall faithfully and conscientiously fulfil." This Royal Uttrrance was repeated by the Royal Proclamation of 1919. The said Proclamation of 1858 also states: "We hereby call upon all Our subjects within the said Territories to be faithful and bear true allegiance to Us, Our Heirs and Successors and submit themselves to the authority of those ..". When these provisions are read together one comes to the conclusion that Her Majesty the Queen called upon the Indian subjects to bear allegiance to the Crown on Her having promised to "hold the Indian subjects by the same obligations of duty which bound Her to all other subjects", *i. e.*, She thereby applied the 'written and unwritten' constitutional laws and conventions of Great Britain to India and upon such obligations She asked Indians to bear true allegiance to the Crown. This has been incorporated, in a way, in clause 2 of sec. 65. The position of Royal Proclamations in law, has alerady been discussed. One can be referred to Halsbury Vol. 7, para 18. (Hailsham Edition, Vol. VI, para 776). The decisions in 6 B. L. R. 392, 40 Cal. 391, and 39 Mad. 1085 are important too. Also, the phrase "*Unwritten Laws*" occuring in sec. 65 (2) is therein construed as meaning 'Rights to personal freedom and property.' If, therefore, any Act or Ordinance is enacted whereby either the allegiance of Indians or sec. 65 (2) is adversely affected, the Act or Ordinance may become *ultra vires* of sec. 65 (2) and the Royal Proclamations. We have also discussed this question while considering the Financial Ordinance and the policy of the Government of India at page 65 *ante*. Those comments may be read herewith.

Whether Ordiance can be renewed? : There is also a constitutional question whether any Ordinance can be renewed after the first period of six months is over. Owing to reasons hereinabove stated, and according to the opinion of a large section of constitutional lawyers, it is contended that from a very strict constitutional point of view,

the Viceroy could not promulgate the expiring Ordinance even with some modifications. But, it can be rightly contended on behalf of the crown that in absence of any restraining clause in the section itself it is perfectly legal to renew any expiring Ordinance.

Similar Provision, whether in Dominion Constitutions ? We have already discussed what is meant by 'Dominion Status' and the nature of the constitutions of the various dominions, viz., Australia, Canada, South Africa, Irish Free State, etc. Sources of the constitutions of the said dominions are the various Acts of Parliament. No provision similar to sec. 72 exists in any of the said Acts.

Proposals regarding Ordinances in the White Paper: It has been proposed to empower the Governor-General to issue an Ordinance at his discretion if he is satisfied that the requirements of the reserved departments, or any of the "special responsibilities" with which he is charged, render it necessary to make and promulgate Ordinances. Ordinarily, such Ordinances will lapse at the end of the period of six months but the Governor-General will be empowered to renew any Ordinance for a further maximum period of six months, if he deems it necessary.

It is also proposed to empower him to issue Ordinances on the advice of his Ministers, if such an occasion arises, when the Assembly is not in session.

The details and the necessary implications of these provisions will be considered at the end of this Chapter while discussing the Federal Legislature.

It seems that the power of renewal has been proposed to be given in view of the doubt that had arisen regarding the power in that behalf under the existing sec. 72.

349 The Crown and the Viceroy: The Powers similar to those given under sec. 72 can neither be exercised by the Crown nor by the Cabinet in England. In effect, therefore, what even the Crown can not do in England, the Viceroy (his agent) can do in India.

350 Case Law: In Bhagatsing's case, (33 Bom. L. R. 950-953), it was laid down by their Lordships of the Privy Council that "the power given to the Governor-General by section 72 is an absolute power, without any limits prescribed, except only that he cannot do what the Indian Legislature would be unable to do, although it is only to be used in extreme cases of necessity, where the good Government of India demands it." "The Governor-General is the sole judge of determining the emergency and deciding that the Ordinances conduce to the peace and good government." "If the Ordinance is such that the Indian Legis-

Sec. 72 lature cannot pass and contains some provisions, which would be repugnant to section 82 (1), it may be *ultra vires* of that section." 1930 Lahore 781; 41 Bom. 390; 20 M. L. J. 387; 39 Mad. 1085. The Martial Law Ordinance is considered in a case reported in 32 Bom. L. R. at page 1613.

351. The Phrase 'Un-written Laws' was considered in 6 B. L. R. 392 and 40 Cal. 391. The Court held that "the rights to personal freedom and of property" are the rights referred to in the phrase 'Un-written Laws' occurring in clause 2 of section 65. The phrase and the interpretation thereof are important while construing and considering any Ordinance, if at all such an Ordinance offends against rights to personal freedom and of property conferred by the unwritten laws of England. With this phrase, there is another inter-related question, the question of allegiance to the Crown. 22 Bom. L. R. 609, P. C.

352. Supremacy of the Rule of Law: It must have been noted that martial law—suspension of all civil authority—could be promulgated only by an Ordinance which can only be justified under the Government of India Act. All such extraordinary measures were taken by the Government only by promulgating the necessary Ordinances. This shows the supremacy of the Rule of Law. The attention of the readers is also invited to pages 82 & 88 *ante*.

67 (1) 353. Powers Regarding Interpellations, Resolutions, etc.:
Questions: The first hour of every meeting of either Chamber is available to members for asking questions and inviting explanations from the Government. A member may put any question for obtaining information on any matter of public concern to the Member of the Government concerned with the department, to which the subject matter of the question relates. A member can also put a question to any other non-official member relating to some bill, resolution, etc., for which he is responsible. The member asking the question or any other member has a right of asking supplementary questions with a view to further elucidate the matter. The Member of the Government, however, has a right to ask for a previous notice of "ten clear days" if he has not got sufficient material with him to answer the question there and then.

The supplementary question would be disallowed by the President if he finds that the same relates to (1) any matter affecting the relations of His Majesty's Government or of the Governor-General in Council with any Foreign State, (2) any matter affecting the relations of any of the foregoing authorities with any Prince or Chief under the Sovereignty of His Majesty, or relating to the affairs of any Prince or Chief, or the administration of the territory of such Prince or Chief and

(3) any matter which is *sub-judice*, i.e., under consideration of any Court of Law. On a difference of opinion as to whether any question falls within those three restrictions or not, it shall be decided by the Viceroy and his decision shall be final.

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The questions could be asked with reference to matters of fact only. They could neither bring in any name nor could they contain any arguments, inferences, ironical expressions or defamatory statements. No hypothetical question can be put.

354. Resolutions: Besides questions, resolutions also can be moved by members. Resolutions can be moved only in cases in which questions can be put. The resolution affords an opportunity to the members (1) for criticising the acts or omissions of the Government, (2) for bringing forward a favourite project of one's own, and (3) generally on budgets, etc. The discussion on a resolution must be strictly confined to the subject matter of the resolution.

These resolutions are regarded as mere recommendations to the Governor-General in Council who can deal with them as carefully as they may think fit. A resolution is not binding upon the Executive Government.

For some time past, the practice of sending answers to questions individually to those members who asked them, had grown up in the Legislative Assembly. Such practice came up for consideration before the Legislative Assembly at its February Session in 1932. Sir Allen Parsons Finance Commissioner of Railways, attempted to dispose of some questions by sending written replies to the member who had asked them on the ground that the questions were of an ephemeral nature. The President intervened and took exception to such procedure. In his opinion, the whole House had the right and privilege of learning answers and therefore he ruled that the answers must be given on the floor of the House. It may be noted here that the members have got the right of putting supplementary questions which right cannot be exercised if the answers are not given on the floor of the House.

355. Motion for Adjournment: We have already dealt with this subject.

356. General discussion: The Governor-General appoints the date and place for a session for each Chamber; the members are accordingly informed of such time and place. The House sits on such dates as the President decides. The House is from time to time adjourned for short intervals either on the ground of public holidays or otherwise by the President. Such adjournments do not terminate a session. A session is brought to a close when the Viceroy, either by notification or otherwise prorogues the same. On prorogation, all pending notices lapse but bills are carried over to the next session.

Sec. 67 The presence of at least seventy-five members is required to form a *quorum* in the case of the Legislative Assembly and at least fifteen members in the case of the Council of State. No House could transact any business without a quorum and in the absence of such quorum the President adjourns the meeting.

Members have to address the President (*i.e.*, other members, through the President) and must rise when they speak.

The official language is English, but any member with the permission of the President may address the House in vernacular.

The President takes *votes* either by ascertaining by 'voice' or by taking votes in writing. When the President puts any matter to vote, members say either 'Aye' or 'No'. The President decides on such voice. If a member, however, is not satisfied with this result, he demands a *poll*. The members thereupon sign the rolls separately kept. The President counts the votes cast in favour of the proposal and against it, and thereupon announces the result. This announcement is considered final.

When any member is addressing and if it is found that he is either using unparliamentary language or is irrelevant or is repeating, etc., any other member may call upon the President to decide whether the member is in order. This is called rising to a *point of order*. The President decides such points of order and his decision is final.

When the debate is going on and if either too much time has been taken up or members are indulging in tedious repetition, any member may apply to the President for closing the debate. Such an application is said to be an application for *cloures*. The President generally takes the sense of the house and decides whether the debate should proceed or close.

356. Recommendations of the Indian Statutory Commission : (*Vol II; Paras 135-163.*) **Federal Assembly:** They recommend the new Legislative Assembly on the basis of a federal type of constitution. One of the reasons why they desire this to be done is that the electorate is unwieldy and one representative for several millions is not desirable. They recommend introduction of the principle of indirect election by the method of proportional representation. The Local Councils would be called upon, under the new scheme, to elect members to the proposed Federal Assembly, not necessarily out of the Local Council. Any man or woman standing on the electoral roll for the Province might seek election to the Federal Assembly representing that Province. The Commission further recommend that one can be both a member of the Local Council and the Federal Assembly, if he is prepared to discharge the double duty. The allowance to be provided for

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members of the Federal Assembly are recommended to be charged on the provincial funds and remain non-votable. Five years' life is recommended for the Federal Assembly. They propose that the Federal Assembly need not be disturbed even though its electors, *i.e.*, Provincial Councils may be dissolved earlier by the Governor. Objections are discussed in the following para.

356 (a). Objections: We have, in Chapter III hereof, discussed the feasibility or otherwise of a federal constitution. If, ultimately, a federal constitution cannot be devised for British India, it is illogical to introduce a Federal Assembly at the top. The proposed Federal Assembly cannot represent all parts of British India. It is unpractical to suppose that a member belonging to any part of a Presidency or a Province will be conversant with the needs and questions of all parts of the Presidency or the Province. Moreover, there is nothing to ensure that all the parts of a Presidency or Province will be represented in an indirect election. Their main object in recommending such a system of election and the type of the Assembly seems to be that one member cannot represent the millions. It is submitted that the same objection stands to a certain extent against the proposal; instead of obviating the said objectionable ground, it is strengthened. In an indirect election, the people can have no control over their supposed representatives. Their recommendation to continue the Assembly even though their electorate, *i.e.*, the Provincial Council may be dissolved, is highly objectionable on the ground that the Assembly ceases to be representative as soon as their electorate is dissolved. They must remain representatives of the Councils. It is also highly improper for a member to be a member in two Legislatures. The position of such a member, will be anomalous when the Local Council is dissolved earlier, and the Assembly is allowed to function. On a vacancy occurring in the Assembly, it is proposed that a bye-election should not be held but it is recommended that the Governor-General should be called upon to *nominate* a member. It is needless to state that such a method seems to be unconstitutional. The object of such a proposal is that in the system of proportional representation, it will be difficult to assure election of a minority group or a community. Why then introduce an undesirable principle and then find out another undesirable means to work it?

356 (b). Minto-Morley Reforms: It must have been noted that during the Minto-Morley Period there was a system of indirect election. When some progress was made towards constitutional reforms, such a system was found highly undesirable and therefore the principle of direct election was introduced under the Mont-Ford scheme.

Sec. 356 (c). Council of State : (*Vol II, Paras 147-155*): They recommend retention of this Chamber in its present form even though they admit that it is incompatible with the proposed Legislative Assembly.

356 (d). Constitutional ?: In a federal system of government, the Lower House is generally composed of representatives elected by constituencies formed on some basis, such as, population, whereas the Upper House or the Senate contains an equal number of representatives from each of the constituent unit without reference to their size. The Commission's recommendations seem to be quite contrary to the established federal principle. They recommend the Assembly on the basis of the Senate and then they find the difficulty to frame a compatible proposal; eventually they recommend the retention of the Council of State. Thus it will be found that the recommendations are *prima facie* un-constitutional.

356 (e). Powers of the Central Legislature. The Federal Assembly will inherit all the powers of its predecessor and the proposed change does not contain any alteration in its constitutional authority. They indicate some additional functions to be performed by the Federal Assembly in the sphere of finance. The powers of the Central Legislature will be almost the same.

356 (f). Whether retrogression ?: The Commissioners are obliged to discuss whether there is retrogression at the Centre. Such a consideration presupposes retrogression. On carefully reading their observations one is obliged to come to the conclusion that their recommendation, in effect, is retrograde at the centre.

357. Proposed Federal Legislature, Its Powers, Procedure And Relations With Other Bodies: White Paper.

Powers of the Federal and Provincial Legislatures: Non-Powers: Exceptions: It will be outside the competence of the Federal and the Provincial Legislatures to make any law affecting the Sovereign or the Royal Family, the Sovereignty or Dominion of the Crown over any part of British India, the law of British Nationality, the Army Act, the Air Force Act, the Naval Discipline Act and the Constitution Act, (except in the case of the last mentioned Act, in so far as that Act itself provides otherwise). The Federal Legislature will, to the exclusion of any Provincial Legislature, have power to make any laws for the peace and good Government of the Federation or any part thereof with respect to the matters which will be settled hereafter. Federal laws so made will be operative both in British India and in the Indian States which will join the Federation. They will also be made applicable

to the British Subject and Servants of the Crown within any part of India and to all Indian Subjects of His Majesty outside India. (Paras 110 **Sec. W.P.** and 111, proposals.)

No Legislature will have power to make laws subjecting in British India any British Subjects (corporate or incorporate) in respect of certain matters referred to in paras 122 and 123, (Proposals) of the White Paper.

Provincial Acts will be made applicable only within the Province. (Para 112, Proposals.)

The Federal Legislature will be empowered to delegate its powers to any Provincial Legislature. (Para 113, Proposals.)

In certain matters both the Federal and Provincial Legislatures will have concurrent powers. And, in certain matters the Federal Legislature will have the power to impose financial obligations on the Provinces.

In the event of a conflict between a Federal Law and a Provincial law in the concurrent field, the Federal law will, ordinarily, prevail except under the circumstances mentioned in para 113 of the Proposals.

357(a). **Conflict between Laws of the States and the Federal Law in respect of a Federal Subject:** The Federal Law will prevail in case of such conflict. (Para 117, Proposals.)

357(b). **Limitation: Questioning the validity of any Act:** It is proposed to prescribe the period of limitation within which any Act can be called in question in any Court of Law.

357(c). **Consent of the Governor General** will be required to the introduction of a bill in any Legislature; but the same will be without prejudice to his power of withholding his assent to, or, of reserving the bill when passed. However, an Act will not be invalid by reason only that prior consent to its introduction was not given, provided that it was duly consented to either by his Majesty or by the Governor-General or the Governor, as the case may be. (Paras 119, 120 and 121, Proposals.)

357(d). **Bounty or Subsidy:** It is proposed to make provision for a bounty or a subsidy in the proposed Constitution Act. (Para 124, Proposals.)

357(e). **Composition of the Federal Legislature:** The Federal Legislature will consist of the King represented by the Governor-General and two Chambers, to be styled the Council of State and the House of Assembly, and will be summoned to meet for the first time not later than a date to be specified in the Proclamation establishing

Sec. the Federation. Every Act will be expressed as having been enacted
W.P. "by the Governor-General, by and with the consent of both the Chambers." (Paras 36 and 37, Introduction ; para 22, Proposals.)

357(f). Power to Summon, etc.: Power to summon, and to appoint places for the meeting of the Chambers, to prorogue them, to dissolve them, *either separately or simultaneously*, will be vested in the Governor-General at his discretion, subject to the limitation that they shall meet at least once in every year. (Paras 23, Proposals)

357(g). Right to address : The Governor-General will be empowered to summon the Chambers for the purpose of addressing them. (Para 23, Proposals.)

357(h). Duration : Each Council of State will continue for seven years, and each Assembly for 5 years, unless sooner dissolved. (Para 24, Proposals.)

357(i). Right to Vote : A member of the Council of Ministers will have the right to speak, but not to vote, in the Chamber of which he is not a Member. A Counsellor will be an *ex-officio* additional member of both Chambers for all purposes but without the right of voting. (Para 25, Proposals.)

357(j). Election of Ministers and strength of Chambers: Various provisions have been proposed to be made regarding the age and other qualifications of the members of the Chambers. (Paras 26, 27, Proposals.)

It has been proposed to introduce the principle of an indirect election with "preference" voting. The "preference" voting will create great hardship at the time of a bye-election ; that principle, at present, exists in the Bombay University and the experience has shown what hardships and difficulties it creates. (Paras 28, Proposals.)

357(k). Penalty for Voting in the Legislature without authority : A person sitting or voting as a member of either Chamber when he is not qualified for, or is disqualified from, membership, will be made liable to a penalty to be fixed hereafter, in respect of each day on which he so sits or votes. (Para 35, Proposals.)

Following a provision which exists in the British Constitution, this provision is sought to be made. An important incident occurred in the British Parliament in 1930, when some members voted even though they were not so entitled; ultimately an Act of Indemnity had to be passed. This subject has been discussed in part II of this treatise.

357(l). Legislative Procedure: Money-bills will be initiated only in Lower Chamber. All other bills will be introduced in either Chamber. The Governor-General will be empowered at his discretion, but subject to the provisions of the Constitution Act and to his Instrument of Instructions, to assent in His Majesty's name to a bill which has been passed by both Chambers, or to withhold his assent, or to reserve the bill for the signification of the King's pleasure. But before taking any of these courses, it will be open to the Governor-General to remit a bill to the Chamber with a Message requesting its re-consideration in part, whole or together with such amendments, if any, as he may recommend. No bill will become law until it has been agreed to by both Chambers, and has been assented to by the Governor-General, or in the case of a reserved bill, until His Majesty in Council has signified His assent. Any bill assented to by the Governor-General will within twelve months be subject to disallowance by His Majesty in Council. (Paras 38, 39 and 40, Proposals.)

Note: Important variations are sought to be made by these Proposals. Certainly, they look more dignified. But, on properly scrutinising them, one finds that (1) the Governor-General is being vested with wide discretionary powers, and (2) His Majesty in Council will, also, have the right of interference with the work of the Federal Legislature. In para 40, it has not been made clear on whose advice His Majesty in Council may disallow any bill assented to by the Governor-General. According to the English Constitutional Convention, that would happen on the advice of one of the principle Secretaries of State. In this case, the Secretary of State for India would, naturally, tender his advice to His Majesty in Council. That will lead the vesting of even the legislative powers in the Secretary of State. Such powers may, in the end, interfere with the partial principle of responsible Government which is being introduced by the present Proposals.

With a view to avoid entering into the domain of politics, further comments are reserved.

357(m) Joint Sitzings: The Governor-General will be empowered, in the case of disagreement between the Chambers, to summon the two Chambers to meet in a joint sitting for the purpose of reaching a decision on a bill. The vote at such joint sitting will decide the question; and, the bill, either with or without amendments will be taken to have been duly passed by both Chambers. In the case of a money-bill, (ii) or in the case of a Reserved Department, (ii) or in the case where the Governor-General is charged with special responsibility, the Governor-General will be empowered in his discretion to summon a joint session forthwith (Para 41, Proposals.)

Sec. 357(n). Governor-General's Act: Regarding the matters in which **W.P.** the Governor-General is charged with special responsibilities, a special provision is sought to be made. If any Chamber does not pass any bill or any amendment thereto, the Governor-General will be empowered to declare by Message that it should for stated reasons become law before a stated date in a form specified in the Message. If in spite of this Message the bill is not passed, the Governor-General will be empowered at his discretion to enact it as a Governor-General's Act, either with or without any amendments made by either Chamber after receipt of his Message. Such Act will have the same force and effect as an Act of Legislature, and will be subject to (1) disallowance in the same manner and (2) the powers and competence of the Federal Legislature. (Paras 42 & 43, Proposals.)

The observations in this behalf in para 334A *ante* should also be noted.

357(o). Power regarding the stoppage of any bill: If the Governor-General is of opinion that any bill or any amendment thereto would affect the discharge of his "special responsibility," he will be empowered to direct that the bill or any amendment thereto shall not be further proceeded with. (Para 44, Proposals.)

357(p). Procedure in the Federal Legislature: The Governor-General will be empowered at his discretion, after consultation with the President or the Speaker as the case may be, to make rules (a) regulating the procedure, etc., (b) regulating any discussion and (c) interpellation, etc.

Each Chamber will also be empowered to make rules regarding the procedure and the conduct of business in the Chamber.

In the event of conflict between the Rules so made, one made by the Governor-General will prevail.

357(q). Ordinances: Emergency Powers of the Governor-General in relation to Legislation: The Governor-General will be empowered at his discretion, if at any time he is satisfied that the requirements of the Reserved Departments, or any of the "Special Responsibilities" with which he is charged by the Constitution Act render it necessary, to make and promulgate such Ordinances as, in his opinion, the circumstances of the case require, containing such provisions as it would have been competent, under the provisions of the Constitution Act, for the Federal Legislature to enact. Such Ordinances will remain in operation for such period, not exceeding six months, or for lesser period as may be specified therein. He will also be empowered to renew any Ordinance for a second period not exceeding six months, but in that event it will be laid before both Houses of Parliament. (Para 53, Proposals.)

Observations in this behalf in paras 347 & 348 *ante* should also be noted. Sec.
W.P.

Ultimate Sovereignty of Parliament is sought to be clearly made out in the Constitution Act itself by providing that in case of renewal, it must be laid before both Houses of Parliament.

357(r). Also, on the advice of Ministers: In addition to the provisions made as indicated in the foregoing para, the Governor-General will further be empowered if his Ministers be satisfied, at a time when the Federal Legislature is not in sessions, that an emergency exists which renders such a course necessary, to make and promulgate any such Ordinance for the good government of British India, or any part thereof, containing such provisions as, under the Constitution Act, it would have been competent for the Legislature to enact.

Such an Ordinance shall have the same legal effect as the other Ordinances as provided for in the foregoing para. But every such Ordinance (a) will be required to be laid before the Federal Legislature; and (b) will cease to operate at the expiry of six weeks from the date of the re assembling of the Legislature, unless both Chambers have in the meantime disapproved of it by a resolution, in which case it will cease to operate forthwith; (c) will be subject to the provisions relating to disallowance of any Act passed by the Federal Legislature; and (d) will be subject to withdrawal at any time by the Governor-General. (Para 54, Proposals.)

Note: It must have been noted that the Governor-General is sought to be empowered with three kinds of special Legislative measures. Two such measures will be absolutely new and the third (*i. e.* regarding the Ordinances) will be with wider powers than those given under the present sec. 72.

Short duration and other qualifications regarding the Ordinances on Ministers' advice seek to have regard to the well-established constitutional convention.

357(s). Procedure with regard to Financial Proposals: Eighty per cent of the Financial matters will be in charge of a Reserved Department. Measures in this behalf are therefore proposed in a way for which no precedent can anywhere be found. Contrary to the usual procedure, the Lord of the Exchequer or a Finance Minister will not prepare the Budget in the Federal Legislature; but the Governor-General will cause a Budget to be prepared and laid in respect of every financial year, before both Chambers of Legislature. Such a Budget will be so provided as (a) to distinguish between the votable and non-votable Proposals and (b) to specify separately those additional proposals, whether votable or non-votable, which are necessary for the discharge of any special responsibilities of the Governor-General.

Sec. In the Budget, the proposals will be submitted in the form of **W.P.** Demand for Grants to the vote of the Assembly which will be empowered to assent to or refuse or reduce any Demand. The whole Budget with the Demands as passed or modified by the Assembly will, thereafter, be laid before the Council of State. Provision is made for holding the joint session of both the Chambers to pass certain Demands if the Government deems it necessary.

In respect of non-votable Demands, the Governor-General will be empowered to decide finally and conclusively, for all purposes, any question whether any particular item falls under the votable or non-votable heads. (Paras 45, 46, 47, 48 and 49, Proposals.)

The authority of the Governor-General alone will be sufficient for certain disbursements.

At the conclusion of the Budget Proceedings, the appropriations so made and authenticated by the Governor-General, will be laid before both Chambers of Legislature but will not be open to discussion. (Para 50, Proposals.)

357(r). Ultimate responsibility of Governor-General and Governors to Parliament : It remains only to explain that in so far as the Governor-General or the Governor is not advised by his Ministers, the general requirements of constitutional theory necessitated that he should be made responsible to His Majesty's Government and Parliament for any action he may take, and that the Constitution should make this position clear. In the case of the Governor the chain of responsibility must necessarily include the Governor-General. (Para 43, Introduction.)

357(u). His Majesty: The Crown: His Position and powers under the New Constitution : Under the New Constitution (1) by Letters Patent, His Majesty will make the appointment of the Governor-General, the Viceroy and the Governors ; (2) He will issue a Royal Proclamation bringing into existence the proposed Federation ; (3) No Legislature will be able to make any law affecting the Sovereign, or the Royal Family or the Sovereignty of the Crown ; (4) the Governor-General will be empowered to reserve any bill for His Majesty's signification ; (5) His Majesty will be empowered to disallow any bill passed by either the Federal or any other Legislature ; (6) His Majesty will be empowered to disallow any Ordinance made and promulgated either by the Governor-General or the Governor ; (7) every Public Office held in India will be said to be under the Crown ; (8) Incumbents of Public Office, excepting the Chief Justice and the Judges of the Federal Court, the Supreme Court and the Provincial High Courts, will hold office

during His Majesty's pleasure ; (9) the executive power and authority of the Federal Government will vest in the Crown ; (10) the Government in India, either Federal or Provincial will be the King's Government ; (11) by Letters Patent, the Crown will delegate various powers to the Governor-General, the Viceroy and the Governors ; similarly, by Instrument of Instructions the Crown will give the necessary directions to those persons for carrying on his (the King's) Government ; (12) Instruments of Accession will be executed by the States entering into the Federation, in favour of the Crown ; (13) Viceroy will be the King's representative and as such he will exercise all the powers of the Crown in relation to States which will enter into the Federation ; (14) the Crown will be represented by the Governors in the Provinces, *i e.*, the Governors will be the Crown's representatives in the Provinces ; (15) His Majesty will appoint the Chief Justice and Judges of the Federal Court (para 151, Proposals) ; (16) on considering any Address from the Federal Legislature submitted to him by the Governor-General, His Majesty may increase the number of Judges in the Federal Court (para 151, Proposals) ; (17) His Majesty will be empowered to grant special leave to appeal to the King in Council from a decision of the Federal Court ; (para 158, Proposals) ; (18) His Majesty will be empowered to appoint the President and the Judges of the Supreme Court ; and (19) the Chief Justice and Judges of Provincial High Courts will be appointed by His Majesty. (Para 169, Proposals).

357(v). His Majesty in Council: Orders in Council: Their position and powers under the New Constitution: In the Reserved Departments provision is made for the appointment of Counsellors. (1) Their salaries and conditions of service will be prescribed by Orders in Council ; (2) Orders in Council will be issued determining (a) the composition of and the method of election to the legislature and (b) such other consequential matters regarding the re-constitution of the Provincial legislature ; (3) by orders in Council, His Majesty in Council, will designate another authority to make appointment of the I. C. S. and analogous services, instead of the Secretary of State, (4) the salaries, pensions, leave and other allowances of the Judges of the Federal Court will be fixed by Orders in Council ; (5) similarly, those of the Supreme Court and (6) of the Provincial High Courts will be fixed by orders in Council (Paras 152, 164 and 171, Proposals.)

357(w). Parliament: Its position and relation with the Government of India under the New Constitution: It has been laid down in the Proposals that the ultimate responsibility of the Government in India (both Federal and Provincial) will rest with Parliament;

Sec. (2) it has been proposed to empower the Governor-General and the **W.P.** Governors to renew the Ordinances; such renewed Ordinances will have to be laid before both Houses of Parliament; (3) it has been made clear that the Governor-General, the Viceroy and the Governors will be ultimately responsible to Parliament. (Para 43, Introduction); (4) on an Address of both Houses of Parliament, His Majesty by Order in Council, will designate another authority for the purpose of making appointments of the I. C. S. and analogous services (Para 187, Proposals); (5) A Statutory enquiry is proposed to be set up at the expiration of five years, to consider the question of future recruitment of the services; (6) the decision on the results on this enquiry will rest with His Majesty's Government and be subject to the approval of both Houses of Parliament; (Para 189, Proposals); (7) His Majesty's Government will have also voice in the future Government of India in connection with the reconsideration of the question of the recruitment for those services.

It must have been noted that (1) His Majesty (the Crown); (2) His Majesty in Council; (3) His Majesty's Government, and (4) Parliament will have direct and effective voice in the future Government of India under the proposed Constitution Act.

357(x). Result : Constitutional Position : Real Rulers under the Constitution Act : In view of the observations made in the Introduction of the White Paper as stated in the foregoing para, a constitutional question arises whether the proposed Constitution can either be said to be, in any way, Federal or Responsible Government. As observed before, it can either be called "Monarchy with (certain specified) delegated powers", or "Partial Responsible Government at-will". The ultimate Rulers under the Constitution Act, will be His Majesty in Council (by Orders in Council), His Majesty's Government and Parliament.

357(y). Governor-General's Relations with the Legislature: The necessary relations in this behalf have already been discussed while considering the powers and non-powers of the Federal Legislature. The general scheme underlying the proposals is that wherever the Governor-General's responsibilities for the Reserved Departments, or his "Special Responsibilities" are involved, he should be empowered not only to act without, or as the case may be, contrary to, the advice of his Ministers, but also to take action notwithstanding an adverse vote of the Legislature, whether such a vote relates to the passage of legislation or to the appropriation of funds. The necessity for the use of the Governor-General's legislative power may arise through the refusal of the

Ministers to be parties to a bill, or to provisions in a bill, which the Governor-General regards as essential to the discharge of his responsibilities. (Paras 34, 35 and 36, Introduction.) Sec. W.P.

357(z). His relations in Financial Matters: The corresponding powers proposed for the Governor-General in the matter of supply are based upon the same principles. The decision as to the appropriations required for the Reserved Departments and for the discharge of the functions of the Crown in relation to the Indian States will, of course, be taken by the Governor-General on his own responsibility. If the Governor-General regards his Minister's proposals for appropriations as insufficient to enable him adequately to fulfil any of his "Special Responsibilities" he will be entitled to overrule those proposals and include them in the Governor-General's Act. The Legislature will not be invited to vote upon any of those items. The Legislature will be invited to vote only on those votable items proposed by the Ministers. After this stage, the Governor-General will be called upon to authenticate by his own signature the Appropriations. While so doing, he will be entitled at his own discretion and on his special responsibilities to include additional proposals and distinguish as such in the Budget, in his authentication, any sums not in excess of those by which the Legislature may have reduced the grant submitted to it. The purpose seems to be to secure that the Governor-General does not make any Appropriations under his special powers without the Legislature being made cognisant thereof. (Paras 36, 37, 38, and 39, Introduction.)

CHAPTER VI

THE INDIAN LEGISLATION (*continued*)

LOCAL LEGISLATURES

358. Constitution of Governor's Legislative Council: There shall be a Legislative Council in every Governor's Province, which shall consist of the members of the Executive Council, and of the members nominated or elected as provided by this Act. **72A**

The Governor shall not be a member of this Council, but shall have the right of addressing the Council, and may for that purpose require the attendance of its members.

The number of members of the Governor's Legislative Council shall be in accordance with the table set out in the first schedule to this Act; and of the members of each Council not more than twenty per

Sec. cent. shall be official members and at least seventy per cent. shall be elected members; provided that subject to the maintenance of the above proportions, rules under this Act may provide for increasing the number of members of any council as specified in that schedule.

72A 2(b) 359. **Nomination of Experts:** The Governor may, for the purposes of any bill introduced or proposed to be introduced in his Legislative Council, nominate in the case of Assam one person and in the case of other provinces not more than two persons, having special knowledge or experience of the subject matter of the bill, and those persons shall, in relation to the bill, have for the period for which they are nominated all the rights of members of the Council, and shall be in addition to the members above referred to.

The powers of a Governor's Legislative Council may be exercised notwithstanding any vacancy in the Council.

Sir Lallubhai Samaldas was nominated as an expert when there was a question of the Land Revenue Code Amendment before the Council. Similarly Khan Bahadur Fardunji Dastur was nominated when the Bombay University Bill was on the anvil of the Bombay Legislative Council. Miss Ida Dickinson was also nominated when the Bombay Prevention of Prostitution Act, 1923, was to be amended. Subsequently, also, on many occasions several persons were nominated as experts.

360. **Rules to be made:** Subject as aforesaid, provision may be made by Rules under this Act as to (a) the term of office of nominated members of Governor's Legislative Councils and the manner of filling casual vacancies; (b) the conditions under and the manner in which persons may be nominated as members of a Governor's Legislative Council; (c) the qualifications of electors, the constitution of constituencies, and the method of election for the Governor's Legislative Councils including the number of members to be elected by communal and other electorates, and any matter incidental to or auxiliary thereto; (d) the qualifications for being nominated or elected member of any such council; (e) the final decision of doubts or disputes as to the validity of any election, and (f) the manner in which the rules may be carried into effect. The powers of making such rules may be delegated to the Local Government.

361. **The Bombay Legislative Council:** It consists of the members of the Executive Council who are members *ex-officio*, and about 21 members nominated by the Governor, so as to make up the number of 26 (including the members of the Executive Council), and 86

elected members. Out of the nominated members, not more than 16 can be official and the rest non-officials to represent the following special interests: (1) labour classes, (2) depressed classes, (3) the Indian Christian Community, (4) the Anglo-Indian Community and (5) the Cotton Trade. Out of the elected 86 members, 46 are non-Mahomedans, 2 Europeans, 3 representing land-holders, 1 representing the University of Bombay, and 7 representing Commercial and Industrial Community. Out of the 46 non-Mahomedan seats, 7 are reserved for Marathas (though no seat is reserved for the purpose of any election.)

H. M's Government's decision regarding constitution of future Provincial Legislature: On page 180 *post*, we have referred to the decision arrived at by His Majesty's Government regarding the constitution of the future Provincial Legislature.

362. Sessions and duration of Governor's Legislative Council: Every Governor's Legislative Council shall continue for three years from its first meeting; but (a) the Council may be sooner dissolved by the Governor than at the expiry of the said period; (b) the said period of three years may be extended by the Governor for a period not exceeding one year, if in special circumstances he so thinks fit; and (c) after the dissolution of the Council the Governor *shall* appoint a date not more than six months or with the sanction of the Secretary of State not more than 9 months from the date of dissolution for the next session of the Council.

A Governor may appoint such times and places for holding the session of his Legislative Council as he thinks fit and may also prorogue the same.

The President may adjourn the sessions for short intervals owing to holidays, etc.

All questions in Governor's Legislative Council shall be determined by a *majority of votes* of the members present other than the person presiding, who shall, however, have and exercise a casting vote in case of a tie.

364. President: For the first four years from the commencement of the Act, the President of a Governor's Legislative Council was to be appointed by the Governor. Thereafter, it is provided that the Council should have an elected president from amongst the members of the Council, subject to the approval of the Governor. Similarly, the Council will have an elected Deputy President. The other provisions with reference to the elected President and Deputy President of a Governor's Legislative Council are the same as those relating to the elected President and Deputy President of the Legislative Assembly.

Sec. 72C If a vacancy occurs in the office of a Deputy President during the continuation of a Council, a fresh election takes place to elect a new Deputy President. If the ratification of a particular Deputy President's election is withheld by the Governor, he shall not be eligible to stand at a fresh election.

Salaries of the President and the Deputy President shall be fixed by the Legislative Council by passing the necessary Act.

Powers of the President, etc: The powers, etc., of the President and those of the Deputy President are the same as those of the President and Deputy President of the Legislative Assembly.

Chairmen: The President in a Governor's Legislative Council, also, nominates at the beginning of every session from among the members of the Council a panel of not more than four chairmen, any one of whom may preside over the Council in the absence of the President or the Deputy President, as is done in the case of the Legislative Assembly. Such a Chairman, when presiding over the Council has the same powers as the President.

72D 364. Business and procedure in the Governor's Legislative Council: The rules regulating the conduct of business in a Governor's Legislative Council are identical *mutatis mutandis* with those of the Indian Legislature, except in a few cases such as legislation and grant of supplies. The Rules regarding interpellations, resolutions, motions for adjournment to discuss a definite matter of urgent public importance, closure and points of order are exactly the same. The difference in procedure regarding the budget, etc., is very minute and the same exists because sometimes the previous sanction of the Government of India is required to be taken.

365. Quorum: The Quorum in the Bombay Council is fixed at 25 members.

72D (2) 366. Budget: Provincial Budget: The estimates of annual expenditure and revenue of a Governor's Province are laid before the Council every year in the form of a statement on the day and the time appointed by the Governor; such estimates are prepared by the Finance Department of the Province on the strength of the information furnished to it by various departments of the Government. Discussion is not allowed on the Budget on the day on which it is first presented.

General discussion first, begins on the budget then specific demands for grants are made by the Ministers concerned, and the votes are taken on such demands. When the demands are put to vote the Council may assent, or refuse its assent, to a demand or may reduce the amount therein referred to, either by reduction of the whole grant or by the

Commission or reduction of any of the items of expenditure of which the grant is composed

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Extraordinary or emergency powers: The Local Government shall have, however, power in relation to any such demand, to act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, if the demand relates to a Reserved subject and the Governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject. The Governor shall have power in case of emergency to authorise such expenditure as may be, in his opinion, necessary for the safety or tranquility of the Province or to the carrying on of any department.

No proposal for the appropriation of any such revenue or other moneys shall be made except on the recommendation of the Governor communicated to the Council.

368. Non-Votable Heads: The following heads of expenditure shall not be submitted to the Council: (i) contributions payable by the Government to the Governor-General in Council; (ii) interest and sinking fund charge on loans; (iii) expenditure of which the amount is prescribed by or under special laws; (iv) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council, and (v) salaries of Judges of the High Court and that of the Advocate-General.

369. Difference of Opinion: If any question arises whether any proposed appropriation of moneys does not relate to the non-votable heads, the decision of the Governor shall be final.

370. Financial Proposals: It shall not be lawful for any member of any Local Legislature to introduce any measure affecting the public revenues of a Province or imposing any charge on those revenues without the previous sanction of the Governor.

80C

371. Procedure regarding Bills: Where any bill has been introduced or any amendment to a bill is moved or proposed to be moved, the Governor may certify that the bill or any clause of it or the amendment affects the safety or tranquility of his Province or any part of it or of another Province and may direct that no proceedings or no further proceedings shall be taken by the Council in relation to the bill, clause or amendment, and effect shall be given to any such direction.

72D

Provision may be made by rules for regulating the course of business, preservation of order, etc.

Sec. 72D **372. Case Law :** In clause 3 of sec. 72 D, as amended in 1925, the words 'payment or emoluments payable to or on account of a person in respect of his office' include the tour expenses and travelling allowances of the Governors and his Councillors and the Inspector General of Police, and therefore these expenses are non-votable items. Even assuming that they were not exempted, the question cannot be raised in Court of Law by reason of clause 4; *Krishna vs. Government of Bihar and Orisa*, 5 Patna, 595 *Shanker Roy vs H. E. A. Cottol*, 40 Cal. L. J 515.

72(7) **373. Freedom of Speech :** The members of a Provincial Legislative Council enjoy the like rights and privileges and are subject to the like restrictions as are imposed upon the members of the Central Legislature.

374. Provision to secure the passage of Legislation: While discussing section 72D clause 5, we have considered about the passage of a bill which in the opinion of the Governor is harmful to public safety, etc We shall now consider how the passage of a bill can be *secured* when the Governor thinks that the passage of the bill is necessary in the interest of public cause.

72E Where a Governor's Legislative Council has refused leave to introduce, or has failed to pass in a form recommended by the Governor, any bill relating to a reserved subject, the Governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon the bill shall, notwithstanding that the Council has not consented thereto, be deemed to have passed and shall on signature by the Governor become an Act of the Local Legislature in the form of the bill as originally introduced or proposed to be introduced in the Council in the form recommended to the Council by the Governor. The Governor shall send an authentic copy to the Governor-General who shall reserve the Act for the signification of His Majesty's pleasure, and upon such signification the Act shall become Law. If the Governor-General thinks the measure to be urgent, he may signify his assent thereto; and upon such assent the Act shall take the force of Law subject to disallowance by the Crown.

An Act, however, made under these provisions shall be laid before each House of Parliament; and the Act which requires presentation for the Crown's assent shall not be so presented until copies thereof have been laid before each House of Parliament for not less than eight days. If either House of Parliament presented an Address to His Majesty against the Act, His Majesty would, of course, withhold assent in accordance with the constitutional convention.

The Control of the Provincial Legislative Council is rather said to be complete over Transferred subjects. The Governor should intervene only in exceptional and extraordinary cases. **Sec. 72E**

The other procedure regarding reservation or return of bills is almost similar to that followed in the Indian Legislative Assembly. See, **81, 81A** however, sec. 81A.

375. Cases in which the Governor shall reserve Bills for the Viceroy's Consideration : Pursuant to the provisions of the rules, the Governor is bound to reserve bills affecting following matters, for the Viceroy's consideration if his previous sanction is not obtained; bills (a) affecting the religious rights of any class of British Subjects; or (b) regulating the constitution or functions of any University; or (c) having the effect of including within a Transferred subject, matters which might have been hitherto classified as Reserved subjects, or (d) providing for the construction or management of light railway or tramway other than a tramway within Municipal limits, or (e) affecting the land revenue of a Province. Such bills must be dealt with by the Viceroy himself and he cannot further reserve them for the signification of the Crown's pleasure.

Cases in which the Governor may reserve : In the following cases the Governor may reserve the bills for the Viceroy's sanction if the same is not previously obtained Bills (a) affecting any matters where-with he is specially charged under the Royal Instrument of Instructions, or (b) affecting the interest of any other Province.

376. Non-Governor's provinces, Lieutenant-Governors and Chief Commissioners : We have seen under the Chapter on Local Government that there are some Provinces whose heads may be either Lieutenant-Governors or Chief Commissioners. According to the provisions of the Act, such Provinces can have Legislative Councils. **73, 76**

Provisions are made to constitute such Legislative Councils and to hold meetings thereof. Provision is also made for conducting business of meetings of such Councils. **78, 79**

377. Case Law : The words in sec. 79, 'to make laws for the peace and good government in territories' are very wide and include a power to direct that dispute of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose. *Abdul Rehman vs. Abdul Rehman*, 47 All. 513. A tax, in essence, imposed on the land, can be validly imposed only with the sanction of proper authorities under sec. 43 and the Statute imposing the burden must do so in clear and unambiguous terms. *Improvement Trust of Calcutta vs. C. K. Ghose*, 44 Cal. 219. **80A**

Sec. 378. Powers of Local Legislatures: The Local Legislature of any Province has powers, subject to the provisions of this Act, to make laws for the peace and good government of the territories for the time being constituting that Province.

The Legislature of any Province may, subject to the provisions given below, repeal or alter as to that Province any law made either before or after the commencement of this Act by any authority in British India other than that Local Legislature.

The Local Legislature of any Province may not, without the previous sanction of the Governor-General, make or take into consideration any law (a) imposing or authorising the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under this Act, or (b) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the Government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty; or (c) affecting the discipline or maintenance of any part of His Majesty's naval, military, or air forces; or (d) affecting the relations of the Government with foreign princes or states; or (e) regulating any Central subject; or (f) regulating any Provincial subject which has been declared by rules under this Act to be, either in whole or in part, subject to Legislation by the Indian Legislature, in respect of any matter to which such declaration applies; or (g) affecting any powers expressly reserved to the Governor-General in Council, by any law for the time being in force; or (h) altering or repealing the provisions of any law which, having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that Local Legislature, is declared by rules under this Act to be a law, which cannot be repealed or altered by the Local Legislature without previous sanction; or (i) altering or repealing any provisions of an Act of Indian Legislature made after the commencement of the Government of India Act, 1919, which by the provisions of such first mentioned Act may not be repealed or altered by the Local Legislature without previous sanction.

Provided that an Act or a provision of an Act made by a Local Legislature, and subsequently assented to by the Governor-General in pursuance of this Act, shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act.

The Local Legislature of any Province has Power to make any law affecting any Act of Parliament.

If the previous sanction of the Governor-General is not obtained, that cannot invalidate the bill if the Governor-General has given his assent afterwards. **Sec. 80A**

Courts of Law cannot challenge the validity of provincial legislation.

The Indian High Courts Act cannot be affected by a Provincial Legislature.

379. Case Law: The words "for the peace and good Government" are used with the widest significance; and it is not open to a Court of Law to consider whether in fact any measure is meritorious in the sense that it will conduce to peace or good Government. *Girendranath vs. Birendranath*, 54 Cal. 728. Clause 4 of the section is doubtless wider than a mere provision that the Local Legislature shall not have power to repeal an Act of Parliament. *Ibid.* Section 80A cannot be interpreted to mean that no Local Legislature can by reason of those words repeal or alter any enactment of its own. *Sarjuprasad vs. Bhagwatiprasad*, 23 All. L. J. 373.

380 Vacancy in a local Legislative Council: An official shall not be qualified for election for a vacancy in the Local Legislative Council and if any non-official member accepts the service of the crown his seat shall be vacant. **80B**

A Minister does not vacate his seat in the Council by his appointment as Minister. He continues to be even a member of a political party in the Council.

381 Power of the Crown: When an Act has been assented to by the Governor-General he shall send to the Secretary of State an authentic copy thereof and it shall be lawful for the Crown in Council to signify his disallowance of the Act. Such act of disallowance shall be forthwith notified and thereupon the Act shall become void. **82**

382. Doubts as to validity: A Law shall not be deemed invalid solely on account of any one or more of the following reasons: (a) in the case of an Act of the Indian Legislature, or of a Local Legislature, because it affects the prerogative of the Crown; (b) in the case of any law, because the requisite proportion of non-official members was not complete at the date of its introduction into the council or its enactment; or (c) in the case of an Act of a Local Legislature, because it confers on magistrates being justices of the peace, the same jurisdiction over European British subjects as that Legislature by Acts duly made, can lawfully confer on magistrates in the exercise of authority over other British subjects in like cases. **84**

Sec. 85 **383. Salaries and allowances of Governor-General:** There shall be paid to the Governor-General of India, and to the other persons mentioned in this Act, out of the revenues of India, such salaries not exceeding in any case the maximum specified in that behalf and such allowance, if any, for equipment and voyage, as the Secretary of State in Council may by order fix in that behalf, and subject to or in default of any such order, as are payable at the commencement of this Act.

86 **384. Leave of absence to the Governor-General, Governors and Members of Executive Councils:** The Secretary of State in Council may grant to the Governor-General, and, on the recommendation of the Governor-General in Council to the Commander-in-Chief, leave of absence for urgent reasons of public interest, or of health or of private affairs.

87 On the recommendation of the Governor-General in Council, the Secretary of State in Council may grant to a Governor leave of absence on similar grounds; and similarly, the Governor-General in Council or a Governor in Council, as the case may be, may grant to any member of their Executive Councils such leave of absence.

89 Such leave of absence shall not exceed a period of four months during his tenure of office, provided the Secretary of State in Council may extend such period if they see sufficient reasons. But such reasons shall be laid down before both Houses of Parliament. The person obtaining the leave shall not vacate his office.

87 **385. Acting Appointments:** A person shall be appointed to act in the place of the person, who has taken leave under section 86, during his absence. His Majesty's Government by a Warrant under the Royal Sign Manual will appoint an Acting Governor-General, a Commander-in-Chief or a Governor.

The Governor-General-Designate is empowered to exercise the powers of the said office before he takes his seat in Council.

386. Recommendations of the Indian Statutory Commission (Vol II, Paras 66-69): Life of the New Council: They recommend the normal statutory life to be five years, with the power to the Governor to extend the period in certain circumstances.

Size of the Council is also recommended to be enlarged.

Separate electorate was recommended to be maintained, but these recommendations can be said to have been superseded by H. M.'s Government's decision on the composition of and the nature of electorates regarding future Provincial Legislatures. These recommendations are considered at page 180 *post*.

Official bloc is recommended not to be maintained. We have discussed at the proper place the merits and demerits of the existence of such a *bloc*.

Sec.

Separate interests will continue to be represented.

Ministers, as before, will not lose their seats on their being appointed Ministers. Non-elected member of the Cabinet will also be a member of the Council in virtue of his office.

They recommend to do away with the present provision that a non-legislator, if appointed a Minister, should seek election to the Council within six months from the date of the appointment.

'Constituent' powers: A Legislature can have either only 'Legislative' powers or both Legislative and 'Constituent' powers. Constitutional powers enable the Legislature to deal with constitutional problems. They recommend that after the lapse of ten years, it should be within the powers of a Provincial Legislature to pass a constitutional resolution providing for changes in (1) the constituencies, (2) franchise, (3) method of election and (4) method of communal representation. Such a resolution should be passed by the majority of two thirds of the community representing.

Legislative powers will be to a certain extent extended in light of the recommended ministry.

386(a). Provincial Autonomy: It is necessary to understand the real meaning of the phrase "Provincial Autonomy". Autonomy means "the condition of an entity, which is law unto itself or makes its own laws." Mr. A. Zimmermann defines the term as "a territory over which there is a Government claiming unlimited authority". Another authority defines it as "in general, freedom from external restraint and self-government". It is also defined as "a polity in which the citizens of any state manage their own government". Indian Constitutionalists have generally meant it to be "a form of Provincial Government free both from the external control of the Government of India and Home Government in England and the internal political condition of representative and responsible government". But so far as it can be applied to the Indian conditions "the true meaning would lie in the former interpretation only". Provincial Autonomy does not necessarily imply the form of autonomous government prevailing in any of the states of the U. S. A. or in any of the dominions. At present, it can be said that only the shadow of Provincial Autonomy exists, meaning thereby that it is only in *embryo*. Even in the Provincial Autonomy as conceived by the Indian Round Table Conference, Provinces will not

Sec. have the same kind of Provincial Autonomy with its true constitutional meaning and significance.

No one, seriously or otherwise, desires the abolition of the Sovereignty of Parliament. But so long as the administration in India is responsible to Parliament, the real Provincial Autonomy cannot exist. *In the Dominions, the Sovereignty of Parliament exists only in (constitutional) theory.* So long as Parliament retains its full Sovereignty and so long as Responsibility is not conceded at the Centre, Provincial Autonomy cannot exist in its true significance. /

The Indian Round Table Conference (1930) had appointed a Provincial Constitutional Sub-Committee which submitted their report to the Conference held on 16th December, 1930.

It was appointed to consider (a) the powers of the Provincial Legislature and (b) the constitution, character, powers and responsibility of the Provincial Executive.

It recommended the abolition of Diarchy and further recommended responsible form of government regarding all provincial subjects including law and order.

The Sub-Committee recommended a form of Responsible Executive, all Ministers being jointly responsible to the Legislature. They further recommended that while appointing Ministers, the Government shall follow the established Parliamentary practice in that behalf. They recommended that an official should not be appointed in the Cabinet.

They recommended repeal of sub-section 3 of section 52 of the present Act. However, they recommend special and emergency powers to be vested in him regarding finance and the unexpected break-down of the constitution.

Regarding the composition of the Provincial Legislature they make certain recommendations which are not now useful in view of the decision arrived at in that behalf by His Majesty's Government.

Provincial Autonomy as proposed in the White Paper: The proposed Provincial Autonomy has been discussed, while considering the Proposals contained in the White Paper regarding the Provincial Government.

386(b). Composition of the Provincial Legislature in the future constitution: On 17th August, 1932, His Majesty's Government published their decision regarding the composition of the various Provincial Legislatures. Their main recommendations are (1) unicameral form of Legislature, (2) special electorates, (3) extension of franchise to

women with separate electorates for them and for each community, (4) separate electorates for commerce, industries and labour, and (5) retention of nomination of Officials. Sec.

While publishing the decision of His Majesty's Government the Premier issued a statement wherein he says "for many years past separate electorates ..have consequently found a place. However much the Government may have preferred a uniform system of joint electorates .. in the meantime, however, the Government have to face facts as they are and must maintain this exceptional form of representation". In Bombay, if Sind is not separated, there shall be 200 seats which will be distributed as follows: 97 for general constituencies in which 5 will be reserved for women and 7 for Marathas, 63 for Muslims including one woman; 10 for depressed classes; 8 for Commerce and Industry; 8 for labour; 4 for Europeans; 3 for Indian Christians; 3 for landholders; 2 for Anglo-Indians; one for Backward Areas; and one for the University.

In the Punjab, the Muslims in effect shall have the majority of 51 per cent and in Bengal, they, in effect, shall have 48.4 per cent.

In the absence of any agreement *inter se*, the Premier had to decide the nature of the electorate and the distribution of seats. The Premier himself in his statement regrets the continuation of the principle of separate electorates. But the fact remains that the principle is continued. This principle has been extended even to women, depressed classes and Indian Christians who had not got separate electorates previously.

By an agreement, subsequently arrived at between the necessary parties, the decision regarding the depressed classes was modified; and, in effect, the separate electorate was replaced by the joint electorate with reservation of seats for them.

386(c). Ministries, how to be formed ?: It must have been noted that Indian Round Table Conference have persistently recommended that the Ministry should be formed on the basis of joint responsibility and on the constitutional practice and theory prevailing in England and other Dominions. The decision of His Majesty's Government, however, shows that elections will not be fought on the basis of specific political programmes as it is done in England; but the elections will be fought on the basis of different non-constitutional parties. Following the constitutional practice, the Governor will be obliged to invite the leader of the party commanding a majority in the Legislature to form a Ministry. It is, therefore, seriously apprehended that there will neither be the Provincial Autonomy nor a substantial form of responsible government

Sec. in very near future. To form such a kind of government, elections must be fought on the basis of political programmes which will be absent in the recommended Provincial Legislatures. There will, therefore, be absence of 'Party Government'. Moreover, so long as no responsible government exists at the Centre, the Provincial Autonomy with its true meaning and significance cannot operate.

387. Proposals in the White Paper Regarding Provincial Legislature

Powers and non-powers of the Provincial Legislature: This subject has been discussed in para 357 *ante* while considering powers and non-powers of the Federal Legislature. (Paras 49, 52, 53 and 54, Introduction; paras 110 to 124, Proposals.)

The observations in this behalf on the Federal Legislature should be noted.

387(a). Governor to represent the Crown: In every Province there will be a Provincial Legislature consisting of the King represented by the Governor, and a Chamber known as the Legislative Assembly.

387(b). One Chamber or bicameral: Except in the Provinces of Bengal, the United Provinces and Bihar, there will be only one Chamber, to be known as the Legislative Assembly. In those three Provinces there will be two Chambers to be known respectively as the Legislative Council and the Legislative Assembly. However, a provision is proposed to be made to abolish the second Chamber in those provinces, if the Legislature of those three Provinces pass an Act to the effect that there will be only one Chamber. In the Provinces where there will be only one Chamber, a provision is sought to be made to create another Chamber by presenting an Address to His Majesty praying that the Legislature may be reconstituted with two Chambers.

387(c). Orders in Council: It has been proposed that Orders in Council will be issued determining (1) the composition and method of election and (2) such other consequential matters regarding the re-constitution of the Legislature. (Para 74, Proposals.)

387(d). Enactment: Every Act of a Provincial Legislature will be expressed as having been enacted by the Governor, by and with the consent of the Legislative Assembly, or, where there are two Chambers, of both Chambers of the Legislature. (Para 74, proposals.)

387(e). Power to Summon, etc., will vest in the Governor, almost, as at present.

387(f). Composition and Franchise of the Provincial Legislature: As there are many political questions connected with the proposals in this

behalf, it is unnecessary to consider them at this stage. (Paras 28, and 31, 78, 82, Proposals. **Sec. W.P.**)

387(g). Penalty for sitting or Voting as a member, when he is not qualified for membership, is proposed to be the same in this behalf as one made regarding a member of the Federal Legislature. (Para 85, Proposals.)

387(h). Legislative Procedure will almost be the same as that proposed for the Federal Legislature. (Paras 88, - 92, Proposals.)

387(i). Bill to be reserved for the consideration of the Governor-General: A Governor General will be empowered to reserve the bill for the consideration of the Governor-General in addition to the similar powers of reservation by a Governor-General in this behalf. (Para 89, Proposals.)

387(j). Governor's Act: Governor's special responsibilities: Proposals in this behalf are, almost, similar to those proposed for the Governor-General. (Paras 92, 93, 94, Proposals.)

387(k). Procedure with regard to Financial Proposals is almost similar to the one proposed to be prescribed with regard to Federal Financial Proposals (Paras 85 to 101, Proposals.)

Procedure in the Legislature will also be similar to one proposed for the Federal Legislature.

387(l). Ordinance by the Governor: It is proposed to empower the Governor to issue Ordinances having effect in the Provinces on the basis similar to the one proposed for the Governor-General. (Paras 103 and 104, Proposals.)

387(m). Break-down of the Constitution: Provision in this behalf is similar to one proposed for the break-down of the Federal Constitution. (Para 105, Proposals.)

387(n). Relations between the Federation and Federal Units: This subject has been discussed in the foregoing paras at convenient places.

387(o). Administrative relations between the Federal Government and the Provincial Units have been considered in paras 125 & 126 of the Proposals.

CHAPTER VII

STATUTORY COMMISSION, FEDERATION AND OTHER CONSTITUTIONAL PROBLEMS

388. We have to invite the attention of the readers to the famous Announcement of 20th August, 1917, which appears at page 51 *ante*.

Sec. It stated, *inter alia*, that 'the policy of His Majesty's Government is that of increasing association of Indians in every branch of administration and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire'.

84A Section 84A of the Act provides for "the appointment of a Statutory Commission within 10 years of the passing of the Act for the purpose of enquiring into the working of the system of government, growth of education, development of representative institutions and matters connected therewith, with powers to the Commission to report as to whether and to what extent it is desirable to establish the principle of responsible government or to extend, modify, or restrict the degree of responsible government then existing therein, including the question whether the establishment of Second Chambers in the Provincial Legislatures is, or is not desirable." Since such a Commission is provided for under the Statute, it is called a Statutory Commission. In 1927, Parliament appointed such a Commission consisting of seven members of Parliament (of both the Houses thereof). Sir John Simon was appointed the Chairman of the said Commission, and therefore, it is commonly known as the Simon Commission though in legal terminology it must be known as the Statutory Commission.

Difficulty arose whether under the then existing section a Statutory Commission could be appointed within the period of ten years as the section provided 'at the expiration of ten years.' Many opined that a Commission could be appointed earlier.

Amendment: But with a view to obviate any difficulty the section was amended and the words 'at the expiration of ten years' were replaced by the words 'within ten years.'

389. Interpretation of the section: Lord Birkenhead, the then Secretary of State for India attempted to interpret and construe the section in a way which is submitted to be incorrect.

84A Lord Birkenhead contended that under the section, if properly interpreted, members of Parliament only could be appointed members of the Commission. Clause (1) of section 84(A) deals with the appointment of the Commission. The wordings are: "The Secretary of State with the concurrence of both Houses of Parliament shall submit for the approval of His Majesty the names of persons to act as a Commission for the purposes of this section". There is nothing in these words to warrant that only members of both Houses of Parliament can be appointed members of the Commission. Lawyers in India carefully considered the construction sought to be put upon these

words by Lord Birkenhead and opined that he was not justified in so interpreting them. Sec.

390. Assembly : At its Winter Session, in 1928, the Indian Legislative Assembly passed a resolution to the effect that the Indian Legislative Assembly should have nothing to do with the Statutory Commission so appointed at any stage or in any form.

Committees : When the British Statesmen saw that Indian political feeling was almost unanimously acute and against the interpretation of the section, they tried to devise a scheme whereby feelings of some Indians may be allayed. They proposed that every Provincial Legislature should elect a Committee of seven persons to co-operate with the Statutory Commission on 'equal footing and equal status' in their task. According to the said scheme each Provincial Committee was to sit with the Statutory Commission when the said Commission was to inquire into the affairs of that Province.

An Indian Central Committee was also proposed to be elected to co-operate with the Statutory Commission on equal footing and equal status. This Committee was to sit with the Commission at all places in British India and in England. The Central Committee was to be elected from amongst both Houses of the Indian Legislature. But the Indian Legislative Assembly being against the original scheme of the appointment of the Commission on fundamental principles, the Viceroy thought it futile to get a Central Committee elected. He therefore formed a Central Committee by *nominating* some members from both Houses of the Indian Legislature.

Various Committees : Special Committees to advise the Commission on technical questions like Army, Finance and Education were also appointed.

391. Work by the Statutory Commission : In the latter half of the year 1929, all Provincial Committees and the Central Committee submitted their reports to the Statutory Commission.

In June 1930, the Statutory Commission submitted its report to Parliament.

The recommendations of the Commission are dealt with at their proper places.

How received? : At its meeting in July 1930, the Indian Legislative Assembly expressed the opinion that recommendations of the Commission were inadequate and unacceptable.

While informing the Home Government, the Government of India is reported to have stated in their Report that the recommendations of

Sec. the Commission were generally found by responsible Indians to be insufficient, inadequate and unacceptable.

392. Round Table Conference: As representative and responsible Indians refused to accept the Statutory Commission under the circumstances already discussed, the then Labour Government (presumably on the suggestion of Mr. M. A. Jinnah) proposed to invite a Round Table Conference in London. Various announcements in connection therewith are discussed in Chapter I hereof.

393. Army, Military and Navy : Statutory Commission Report: (Vol. II, Paras 196 to 215): The recommendations of the Statutory Commission regarding army are said to be retrograde. In their opinion the question of external defence is one affecting the Imperial Government and therefore to a certain extent there is Imperial responsibility for the same. They also contend that many difficulties would arise if the army is placed under the control of Ministers. Under these and some other circumstances, they recommend that the Indian army should be placed under the Imperial authority. They also propose that the Indian revenues should contribute to the Imperial Government an annual total sum for the army. Such contribution would be non-votable.

The Commission also feels that there is need for British troops and Indianisation of the army can and must proceed at a slow pace.

The difficulties which seem to be insurmountable to the Commission can be solved if a Sandhurst is established in India and if compulsory military training is introduced. Every student in the schools and colleges should undergo compulsory military training for at least five years unless otherwise exempted on medical or such other grounds. Similarly, every citizen between the age of 21 and 45. should compulsorily be required to undergo military training unless exempted on medical or such other grounds. One may raise the question of financial difficulties to meet such proposals, but a scheme properly framed and carried out would obviate all difficulties, financial or otherwise.

Military and Politics: The constitutional position of Military *vis-a-vis* politics has been discussed at page 88 *ante*.

394. Indian Constitution whether unitary : In the second part of this treatise we have explained and discussed what is meant by unitary type of government. Keeping the main incidents of such a type of government in view, it must be said that, in working, India has an unitary type of Government.

Sec.

The main incidents are: (1) No difference between fundamental and ordinary laws, (2) Sovereignty of Parliament, (3) nothing like administrative laws and (4) Courts have no authority to pronounce on the validity or otherwise of an Act of Parliament. The Indian Constitution has some of the similarities of this type of constitution because (1) Indian Courts cannot pronounce on the validity or otherwise of an Act of Parliament, (2) Legislatures can override the decisions of Courts of Law, (3) resolutions of Indian Legislatures are not laws and (4) the voters have political influence and not legal. Dissimilarities are: (1) there is a difference between fundamental (constitutional) and ordinary laws, (2) the Indian Legislature is not vested with Sovereignty, (3) Viceroy can himself make laws and (4) Courts could pronounce on the validity or otherwise of an Act of the Indian Legislature.

395. Whether Federal: Incidents and particulars of a federal type of government are also discussed in the second part hereof. Principal incidents of a federal constitution are three, *viz.*, (1) Supremacy of the constitution, (2) Distribution of powers and (3) the power of the Judiciary.

Dealing with the first incident, *i. e.*, the supremacy of the constitution, we find both similarities and dissimilarities. **Similarities are:** In both the Indian and the Federal constitution, the constitution is written and supreme. In a Federal system, the constitution is rigid. Indian constitution can be said to be both rigid and flexible; flexible, because Parliament can make and unmake any law without difficulty and therefore Parliament can amend the Government of India Act and thereby change the Indian constitution at any time; rigid, because it would not be changed by the Indian Legislature and Indians cannot get it changed according to their own way and will. Moreover, Parliament will not amend the Act easily. A number of years would be occupied in investigating whether any change is necessary. **Dissimilarities are:** The Indian Constitution cannot legally be said to be rigid as explained; and (2) the legislatures in India are non-sovereign law-making bodies.

Dealing with the 2nd incident, we find also *similarities and dissimilarities*. **Similarities are:** There is to a certain extent distribution of powers; the Presidents of the States in America and the Governors and the Governor-General in India stand, to a certain extent, on a similar footing. It may, however, be noted that distribution of powers in India is only formal, because, it is proved in actual working that the ultimate powers of superintendence and control are with the Secretary of State for India.

Dealing with the last incident, we find that the judiciary, both in

Sec. India and America, is appointed under the constitution. Similarly, they have powers to interpret and declare the validity or otherwise of the Acts of legislature. Indian courts cannot, however, question the validity of an Act of Parliament.

396. Whether federal Constitution for British India Possible?

Some of the observations in the Mont-Ford Report, some recommendations of the Statutory Commission and the White Paper suggest a federal constitution for British India. Still, it is a question whether such a form of government is a practical possibility. The administration, associations and ideals have so grown or developed that it would be almost impossible to create either a Presidency or a Province on the basis of various States of the United States of America. The fundamental principles and incidents underlying a federal constitution would be absent in any form of Indian constitution that may either be formed, grown or developed in British India. There will be various difficulties in creating any Presidency or Province absolutely independent.

Confederation: In the second part of this treatise, we have discussed the meaning and constitutional significance of the term 'confederation.' His majesty's Government (by the White Paper) have decided that the future constitution of India must be based on the principle of Federalism. The principle of 'confederation' had been drawn into discussion by Sir Manubhai Mehta who was a delegate at the said conference representing the Indian State. Sir Manubhai (as reported in the 'Times of India' dated 30-4-1931) contends that the States do not desire to have Federation but what they want is Confederation. In a Confederacy, the Central Government has no authority directly over the citizens of various States, but, only on the States as individual units entering into the compact. It presupposes a *league* of several *independent* States who without parting with their individual sovereignty, enter into a *compact* for certain common purposes, usually, that of defence. The letter addressed by Lord Reading (the then Viceroy) to H. E. H. the Nizam. makes it very clear that the Native States are in no way *independent and sovereign* States; paramountcy vests in the Crown and the Crown is responsible for the good government, peace and tranquility of British India. It is, therefore, clear that Sovereignty, if there be any, in Indian Princes is a Sovereignty-at-will. Such being the constitutional and legal position of Indian Rulers, Confederation is an impossibility. Sir Manubhai further contended that in the event of federation coming into existence, there would be double citizenship and double allegiance. Although, ostensibly, these things may not at present appear to exist in the States, they exist both in theory and practice, as suggested by the letter of Lord Reading.

**397. Federation: Seven Federal Constitutions of the World: Sec.
Main characteristics in each :**

There are seven Federal Constitutions of the World, viz., the United States of America ; Switzerland; Republican Germany; the Commonwealth of Australia (the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. ch. 12); South Africa (the South Africa Act, 1909, 9 Edw. VII ch. 9); the Irish Free State (the Irish Free State Constitutional Act, 1922, 13 Geo. V. ch. 1) and Canada (the British North America Act 1867, 30 Vict. ch. 3) The last four have to be read with the Statute of Westminster, 22 Geo. V. ch. 4.

The constitutions of the first three aforesaid States were made by those countries themselves ; whereas, the constitutions of the last four Dominions were made by British Parliament ; but by the Statute of Westminster, they are made *quasi*-independent. In Ireland, the Premier tendered (constitutional) advice to the King in October 1932 and upon such advice, the Governor-General of Ireland tendered the resignation of his office.

There are some main characteristics peculiar to Federalism and we shall consider how each characteristic exists in each of the aforesaid constitutions.

397(a). SOVEREIGNTY :

In America, Sovereignty vests in the Federal Legislature (Congress), which, however, shares the same with the States and the people as a whole; in fact, it derives its powers solely from the people. And therefore, Sovereignty in America resides in the people as a whole.

In Switzerland, "The Cantons (*i. e.*, States) are Sovereign in so far as their Sovereignty is not limited by the Federal Constitution, and as such they exercise all the rights not explicitly delegated to the Federal power." It may be noted that the Constitution of Switzerland is much more Confederal than Federal and therefore "the peoples of the 22 Sovereign Cantons of Switzerland ..compose together the Federation." The Swiss Nation as a whole has got a right, by referendum, to decide any *fundamental* question and therefore the Swiss people, in effect, is the uncontested and direct Swiss Sovereign.

In Republican Germany, Federalism exists only in form but the Sovereignty vests in the people. In Imperial Germany (before 1919) Confederacy prevailed and therefore each of the States had retained its own Sovereignty as they had confederated together for the purpose of external defence. In the Republican Germany, the people are the Sovereign as laid down in Article I of the Constitution.

Sec. *In Australia*, legal Sovereignty still vests, in theory, in the Crown and the Imperial Parliament, but the *political* Sovereignty resides in the people of the Commonwealth. But by the Statute of Westminster even the legal Sovereignty, if there be any, is practically vested in the people of the Commonwealth.

In South Africa, the Federalism in its true meaning and significance, does not really prevail. By implication, the Sovereignty vests in the South African Nation.

The Irish Free State Constitution follows mainly the Canadian Constitution. Sec. 3 of the Irish Free State Constitution Act, 1922 (13 Geog. V, ch. 1) lays down : "if the Parliament of the Irish Free State makes provision to that effect, any Act passed before the passing of this Act which applies to or may be applied to self-governing Dominions shall apply or may be applied to the Irish Free State in like manner as it applies or may be applied to self-governing Dominions" By Article 2 in Schedule first to the said Act, the Sovereignty has been vested in the people of Ireland. By Article 6, the liberty of the people has been made inviolable

In Canada, the Sovereignty, in effect, vests in the nation.

397(b). THE RESIDUE OF SOVEREIGNTY :

In America, the residue of Sovereignty belongs to the States individually or to the people as a whole *In Africa*, it belongs to the Union. *The Canadian Constitution* "is more generally speaking of the centripetal character." *In Australia*, the residue vests on the American model. *In Switzerland*, the residue is vested on the basis of complete Provincial Autonomy. And in *Republican Germany*, it vests in the Central Government.

397(c). LEGISLATIVE POWERS.

In America, "all Legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

In Australia, "The Legislative Power of the Commonwealth shall be vested in a Federal Parliament."

In Canada, "There shall be one Parliament for Canada. The exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the clauses of subjects next hereinafter enumerated."

In Switzerland, the Legislative Power is vested in the Federal Legislature; but in some cases, subject to the Referendum.

In South Africa, section 59 of the Act gives the Parliament of the Union full power to make laws for the peace, order and good government of the Union. Section 85 of the said Act deals with the powers of the Provincial Councils. Sec.

In Germany, the Legislative Power is vested in the Legislature.

In Ireland, by Article 12, all Legislative powers are vested in the Irish Parliament consisting of the King and the two Houses. The Parliament has got "the sole and exclusive power of making laws for the order and good government of the Irish Free State."

397(d). IMPLIED POWERS:

The doctrine of "Implied Power" is evolved from the American Constitution. When an express provision is not made regarding Legislative Powers in the Constitution itself, one has to look either to the case-law or to the precedents or to the implied meaning of the section. In *M'Culloch vs. The Secretary of State of Maryland*, the Chief Justice Marshall propounded the doctrine of implied powers. According to the said decision, the Federal Government has such powers.

Concurrent Powers : Regarding some subjects, both the Central and Provincial Legislative have got concurrent legislature powers.

397(e). PRESIDENT OR MINISTRY OR EXECUTIVE :

In America, "the President is the supreme Federal Executive authority, and derives his powers direct from Sovereign people."

In Australia, Governor-General in Council are the administrators on the basis of 'Responsible Government.'

In Switzerland, "the Nation is Monarchy, the Executive and the members of the Legislature are the people's agents or Ministers." The executive Federal Government in Switzerland, is different from the Cabinet system of England, France, etc., and from the Presidential form of Government of America. Though not responsible in the English constitutional sense, there exists the most efficacious responsible form of government.

In South Africa, the executive form of government is similar to one prevailing in England.

In Ireland, the Executive is appointed under and derives its powers from Articles 51, 55 and 60. It is based on the model of the Canadian Constitution.

In Republican Germany, there are (Central) National Government and State Governments in accordance with the German Consti.

Sec. tution. In the National Government there are National Presidents for the National Cabinets as provided for in the Article 48. The President of the Republic is elected in a way similar to the election of American President.

397(f). JUDICIARY :

In America, "The limits of Judicial Powers are more difficult in definition." There is the Supreme Court which derives its power from the Constitution, and interprets the Constitutional Laws.

In Switzerland, there is a Federal Judiciary which is less powerful than the American Supreme Court. This Federal Judiciary has no officer of its own for the enforcement of its judgments and therefore they have to rely on the Executive for executing their judgments.

In the Dominions, the Judiciary derives its power from the Constitution and the Tribunals are constituted as provided for therein.

In Ireland, reference to the Judiciary is made in Articles 64, 68, and 69. "The Judicial power shall be exercised in the public Courts established by the Irish Parliament, by Judges appointed in manner hereinafter provided." The Judges continue in office during good behaviour. "All Judges shall be independent subject only to the Constitution and the Law."

397(g). CONSTITUTIONAL AMENDMENTS :

In America, the manner in which the constitution can be amended is laid down in Article Fifth of the Constitution which runs as follows : "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to the Constitution, or on the application of the Legislatures of two thirds of the several States shall call a Convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislatures of two-thirds of several States or by Convention in three-fourths thereof, as the one or the other ratification may be proposed by the Congress, provided that no amendment, which may be made prior to the year 1808, shall in any manner affect the first and fourth clauses in the fifth section of the first Article and that no State, without its consent, shall be deprived of equal suffrage of its State." It is clear from this Article that the proposal for amendments may either emanate from the Congress or from the States, two-thirds whereof may agree. The Constitution of any State can be amended also on the principle analogous to the one laid down in the said fifth Article. The proposal can emanate from a minimum number of electors in a certain prescribed way.

In Australia, the procedure for amendment is laid down in Chapter VIII, Article 128: The proposed law for alteration thereof must be passed by the absolute majority of each House of Parliament...". If either House rejects or fails to pass it or passes it with some amendment to which the other House may not agree, the Governor-General may submit the proposal as last proposed by the first mentioned House, with or without, amendments, to the electors of each State qualified to vote for the election for the House of Representatives'. The Constitution is amended according to the vote of all the electorates. This is done by the Governor General submitting to the Crown the vote of the total electorate. It is noted hereinabove that the Constitutions of Dominions are framed by Acts of Parliament, and therefore Parliament is the final authority to amend the said Acts. But by the aforesaid provision, "Parliament voluntarily transferred to the Australian people and the Australian Parliament one of the fundamental factors in National Sovereignty." "Parliament is bound to carry out the proposal as decided by the vote of the total electorate; in default, the secession of Australia from the British Empire would be imminent," at least, after the passing of the Statute of Westminster.

In Canada, no specific provision is made in the Act for constitutional amendment. It can therefore be inferred that the power of amendment does not rest with Canada but rests with the Imperial Parliament. There is, however, no difficulty in having an amendment made, if and when desired. An Address to the Sovereign may be voted by both Houses of Parliament at Ottawa asking for the amendment specified. According to the un-written Constitution, the vote on the Address must be unanimous (or practically unanimous) or it will not be forwarded to London. When the Address is received by the Colonial Secretary in London, the desired amendment to the British North America Act is passed by the Imperial Parliament *as of course and without debate*. "This is, in substance, simply giving legal validity to an amendment agreed upon by the parties to the original contract, which they desire to amend." (Mr. Justice Riddell.)

In Africa, the procedure for the amendment is laid down in Article 125. "Parliament may by law repeal or alter any of the provisions of the Act, provided both Houses of Legislature at their joint sitting passed an amendment in a certain form and in a certain way." This provision is in a strict sense different from the customary Federal form. However, if the South African people agree to a certain amendment Parliament is bound to amend the Act accordingly.

In Switzerland, the process is not so simple as it looks. Federal constitution may be revised by the Federal Legislature after the amend-

Sec. ment is passed through both Houses. If, however, one Chamber rejects the proposal of the other or if a requisition is sent duly signed by 5000 voters demanding an amendment, the whole matter is submitted to the vote of the entire Swiss electorate. The result is that the amendment is subject to the *referendum*. This process vests the Swiss Nation with complete Sovereignty.

The provision for amendment, in *Imperial Germany*, was made in Ch. XIV, Art. LXXVIII. Article 76 of the present German constitution lays down the procedure for carrying out amendment of the Constitution. The Constitution may be altered by Legislation. "But decision of Reichstag as to such alteration comes into effect only if two-thirds of the total number of members be present and if at least two-third of those present have given their consent." The decision of the Reichstag in favour of alteration of the constitution also requires a majority of two-third of the votes cast. Where an alteration of the constitution is decided by an appeal to the people, at their request, the consent of the majority of voters is necessary. If the Reichstag have decided upon an alteration of the constitution inspite of the protest the President of the Federation is not allowed to promulgate this law if the Reichstag, within two weeks, demand an appeal to the people." It must have been noted that the referendum is contemplated if any event happens as contemplated in the latter portion of the said Article 76.

In *Ireland*, provision for constitutional amendment is made in Arts. 48 and 50. Impliedly, it is based on the principle of referendum

397(h). **Essence :** "The maintenance of the line as fixed by the federating agreement is of the essence of modern Federalism, as exhibited in three Anglo-Saxon Federations of to-day, (namely) the United States of America, the Commonwealth of Australia and the Dominion of Canada." In Canada, "they agree to commit themselves to the control of one common Government, in relation to such matters as are agreed upon as of common concern, leaving each local Government independent and autonomous in all other matters." (Mr. Justice Clement.)

398. **Federal Constitutoin for All-India :** If, however, British India, and Indian States are to be brought together under one Power or sovereignty, it can be done under a federal constitution. In that event, British India may be one unit; Native States may be made various units; and then a federal constitution may be framed. Sir P. S. Shivswami Iyer points out some difficulties with reference to units to be framed out of Indian States. His main difficulty is that there are in all about 561 States, a preposterously large number

for the provision of separate representatives for each State; he further argues that there is no equality in all these States and therefore there would be absence of the principle of equality between the constituent States, which is of great necessity in a federal constitution. Sir S. Iyer also feels that representatives of the States would merely represent States and not directly the people of the States and therefore the Federal-Assembly will not be compatible with the principle of Responsible Government. But, it is believed that if serious attempts are made in that behalf, a proper solution can be found out. Sec.

399. Recommendations of the Round Table Conference: At page 158 *ante* proposals made by the Federal Structure Sub-Committee are considered and discussed. We therefore do not propose to repeat what has been stated already. It shall be interesting to note here the observations of Mr. Bright, M. P., made by him on the floor of the House of Commons at the time of the second reading of the Government of India Bill of 1858. "I would propose, that instead of having Governor-General and an Indian Empire, we should have neither the one nor the other. I would propose that we should have Presidencies and not an Empire. If I were a Minister.....and if the House were to agree with me, I propose to have at least five Presidencies in India, and I would have the Government of those Presidencies *perfectly equal in rank and in salary*. The Capitals of those Presidencies would probably be Calcutta, Madras Bombay, Agra, and Lahore. I will take the presidency of Madras as an illustration. it has the advantage of being more compact...than the other Presidencies. It has a Governor and a Council. I would...confine all their duties to the Presidency of Madras. And I would treat it just as if Madras was the only portion of India connected with this country. I would have its finance, its taxation, its justice and its police department as well as its public works and military departments, precisely the same as if it were a State having no connection with any other part of India and recognised only as a dependency of this country. I would propose that the Government of every Presidency should correspond with the Secretary of State for India in England..I have no doubt that I shall be told that there is insufficiency of finance in the way of such an arrangement and I shall be sure to hear all the military difficulties. But I know that military experts often create mistakes. I would have the Army divided, each presidency having its own army just as now, care being taken to have them kept distinct and I see no danger of any confusion or misunderstanding when an emergency arose in having them brought together to carry out the views of Government." If the principle of Federation in its true meaning and significance is to be

Sec. applied to the future constitution of India, the suggestion made by Mr. Bright ought to be first carried out. Unless each Province or Presidency is made independent and autonomous in the way in which it was suggested by Mr. Bright, it is impossible, that the principle of Federation can be carried out. The first essence of Federation is decentralisation. At present, there is so much centralisation that it is practically impossible to have as clear and sufficient decentralisation as is necessary for the formation of a Federation. However, if the Provinces are made independent and autonomous either on the basis suggested by Mr. Bright or on the basis of the present premier Native States, Federation may be evolved and be made a success.

400. The Proposed Burman Constitution: At page 32 *ante* the Committee of the Round Table Conference for Burma has been referred to. The said Committee recommended the separation of Burma from India, but subject to the vote of the Burman Legislature, which was to be elected on the issue of separation. The Government have published their proposals for the future Burman Constitution.

Legislature: They propose two Houses of Burman Legislature, but they propose that the powers of both Houses should be equal in respect of Legislative functions including 'money bills'; but the power of 'supplies' should vest only in the Lower House. (Note: The procedure of investing the Upper House with the power of dealing with 'money bills' seems to be a departure from all constitutional doctrines. Even in India, where all constitutional powers have not been conferred upon the Indian Legislature, the Upper House is not given such powers.

The Ministry: Regarding the Ministry, their proposals are that the Ministry should consist of six but not more than eight Ministers, who should be appointed by the Governor-General, should hold office during his pleasure, and, should be responsible to the Legislature. In appointing Ministers, the Governor should *normally* seek the advice of the leader of the party commanding the largest following in the Lower House. The Governor shall have the right to preside over the meetings of the Ministry. (Note They do not propose to introduce the principle of joint responsibility in the Ministry; they also do not propose to have the principle of Premiership, as they propose that the Governor should have the right to preside over the meetings of the Ministry.)

Finance: It is proposed that the direction of monetary policy including exchange, currency and coinage should be reserved to the administration of the Governor.

Safe-guards: It is proposed that services should not be put under the control of the Ministry. (Note: Our comment on the diarchy is applicable here also.) They also propose that the Statute should provide for the appointment by the Secretary of State of a Financial Adviser to Government. (Note: Our comment on the heading 'Finance' applies here also.) The Governor is not necessarily bound, it is proposed, to act on the advice of his Ministers; and the Ministers are to continue in office during his pleasure. (Note: These proposals are contrary to the constitutional doctrine of Responsible Government.) **Sec.**

CHAPTER VIII

THE PUBLIC SERVICES

401. By the Charter Act of 1793 (since repealed), the Company's Civil Service was strictly regulated by seniority and was confined to one Presidency only. By the Indian Civil Service Act of 1861 (since repealed), the restrictions under the Act of 1793 were removed but number of appointments were reserved for members of the Covenanted Civil Service.

Under this Act, the Secretary of State has got powers with the concurrence of a majority of votes at a meeting of the Council of India, to frame rules for regulating and classifying Civil Service of India, and for fixing terms and conditions as to recruitment, pay, etc. He is allowed to delegate such powers to the Government of India or to Local Governments or to various Legislatures in India. **96B (2)**

402. Case Law: A Government servant is entitled to bring an action against the Secretary of State for damages for wrongful dismissal. The Government is bound to follow any provision which might have been laid down in the Statutory Rules. By breach of the said Rules, the Government makes the Secretary of State liable for damages. *Vimal Charan vs. Trustees of the Indiau Museum*, 57 Cal 231; *Satish Chandra vs. Secretary of State* 54 Cal. 44; *J. R. Borroni vs. Secretary of State*, 1929 Rang. 207.

403. "Accruing Rights": In spite of the provisions of this Act, the Civil Servants appointed prior to this Act are entitled to retain their pre-existing and "accruing" rights. The expression 'accruing rights' has caused much controversy. It means, according to the Law Officers of the Crown, all rights to which members of the Civil Service are entitled whether by Statute or by Rule, or by Regulation in force at the time of their entry into the service. They do not, however, include prospects of promotion except in cases where the promotion is no more **Provi- so to 96B (2)**

Sec. than advancement by seniority to increased pay, as in the case of
96B various appointments borne upon the ordinary list of time-scales of pay. In particular, they do not apply to general expectations of possible appointments to offices which are not included in the ordinary time-scale list. Civil Servants, on the other hand, are reported to have disagreed with the opinion of the Law Officers, and claim their *prospects* of promotion to all higher posts existing at the time of the passing of the Act; in the alternative they claim compensation.

404. Office 'during pleasure': Subject to the provisions of the Act and the Rules made thereunder, all persons in the Indian Civil Service hold office during his Majesty's pleasure and may be employed in any manner, by any proper authority, within the scope of his duty. They are not liable to be dismissed by any authority subordinate to that by which they were appointed. Without prejudice to any other right of redress, they have got a right to complain to the Governor of the Province, and the Governor has to examine such complaint and require such action to be taken thereon as may appear to him just and reasonable.

96C **405. Public Service Commission:** There shall be established in India, Public Service Commission, consisting of not more than five members, of whom one shall be Chairman, appointed by the Secretary of State in Council. Each member shall hold office for five years, and may be re-appointed. No member shall be removed before the expiry of his term of office, except by order of the Secretary of State in Council. The Secretary of State, with the concurrence of a majority of his Council, shall make Rules as to qualifications for appointment, pay, pension, etc. The Public Service Commission shall discharge functions in regard to recruitment and control of the public services and such other functions as may be assigned thereto.

The Royal Commission, commonly known as the Lee Commission, recommended that the following functions should be assigned to the Public Service Commission: (1) The recruitment of personnel for the public services and the establishment and maintenance of proper standards of qualifications for admission to them; (2) quasi-judicial functions connected with the disciplinary control and protection of the services.

From the time when Mr. Lloyd George was Prime Minister in England, the 'Indian Civil Service' has come to be known as *steel-frame*. Many Britishers have paid glowing tributes to this steel-frame.

96D **406. Financial Control:** An Auditor-General in India shall be appointed by the Secretary of State in Council and shall hold office

during the Crown's pleasure. The Secretary of State in Council shall, by Rules, make provision for his pay, powers, duties, etc.

**Sec.
96D**

Subject to any Rules made by the Secretary of State with the concurrence of a majority of votes at a meeting of the Council of India, no office may be added to or withdrawn from the public service and the emoluments of no post may be varied, except after consultation with such financial authority as may be designated in the rules.

The Rules referred to in this Chapter shall not be made by the Secretary of State without the concurrence of a majority of votes at a meeting of the Council of India.

96E

407. Ten per cent cut in the Salaries : (*Indian pay (Temporary Abatement) Act, 1931, 22 Geo. V, ch. VII*): Owing to financial difficulties, it was suggested that there should be retrenchment in India and therefore salaries of statutory (covenanted) and other officers should be reduced by 10 per cent. It was contended that the Government had no power so to do. Therefore, the said Act was passed, whereby the salaries of the I. C. S. and other statutory officers were temporarily reduced by ten per cent. There was no legal difficulty regarding the Provincial Service which is not a covenanted one. The salary of those in the Provincial Service can be reduced by the Government without resort to any new Act; and their salaries were, also, reduced by 10 per cent. By a subsequent amendment, it is made 5%.

Rules for admission to the I. C. S. : The Secretary of State in Council may with the advice and assistance of the Civil Service Commissioners, make rules for the examination of British subjects and of persons in respect of whom a declaration has been made under section 96A of this Act, who are desirous of becoming candidates for the examination of the I. C. S. The rules shall prescribe the age and qualifications of the candidates and the subjects of examination. All rules thus made shall be laid before Parliament within fourteen days after they are made. The candidates certified to be entitled shall be recommended for appointment according to the order of their proficiency as shown by their examination results. Such persons only shall be admitted to the I. C. S. by the Secretary of State in Council. The Secretary of State is empowered with the concurrence of a majority of votes at a meeting of his Council, to make appointments to the I. C. S. of persons domiciled in India

There are, at present, five methods of recruitment to the I. C. S. viz., (1) open competitive examination in London, (2) open competitive examination in India, (3) nomination in India, (4) promotion from the Provincial Civil Service, and (5) appointment from the Bar.

Sec. 98E In the case of the examination held in India, the Viceroy in Council may at their discretion limit the maximum number of candidates to two hundred for admission to the examination. A candidate must neither be less than twenty-one nor more than twenty-three in age on the first day of August in the year in which the examination is held. The persons so selected in India have to proceed to England to remain there on probation for a period of two years. Such probationers have to appear at two examinations—one at the end of the first year, and the final examination at the end of the next year.

Sec. 99 Provisions as to nomination in India are made with a view to encourage certain minorities and backward communities, and also to encourage persons of "proved merit and ability."

100

Some persons in the Provincial Service of importance to the State and of proved merit and ability, should be encouraged and with this view provision is made for promoting such members to the I. C. S.

408. Offices reserved to the I. C. S. : Subject to the provisions of this Act, all vacancies happening in any of the offices specified or referred to in the third Schedule of this Act, and all such offices which may be created hereafter, shall be filled in from amongst the members of the I. C. S.

409. Provincial and Subordinate Services: These are services lower in the grade than I. C. S. Such services are known either as Provincial or Subordinate Services. Appointments to these services are made by competition, by direct nomination or by promotion.

410. Recommendations of the Indian Statutory Commission, (Vol. II): The control of the Secretary or State over the services will continue. (Paras 182 and 301).

They recommend safeguards for the position of existing officers and for retiring officers on proportionate pension. (Paras 362 to 369)

I. C. S Governor: During the Mont-Ford period, some members of the I. C. S. are appointed Governors in Provinces. The Statutory Commission recommend special pension to such Governors on the ground that they have to strain their brains more.

411. H. M. Queen Victoria and the services: In 1898, Her Majesty the Queen is reported to have written a very important letter to Lord Curzon (then Mr. Curzon) the then Viceroy-Designate: "The future Viceroy must really shake himself more and more free from his red-tapist, narrow minded council entourage". When writing to Lord Salisbury, she is reported to have expressed herself as follows: "He must be more independent; must *hear for himself* what the feelings of Natives really are and do what he thinks right and not be guided

by the snobbish and vulgar, overbearing and offensive, behaviour of our civil and political Agents". On another occasion, H. M. The Queen is reported to have expressed, "if we are to get on peacefully and happily in India," it could not be done by "trying to trample on the people and continually reminding them and making them feel that they are conquered people." ("The Letters of Queen Victoria.")

412. Proposals Regarding the Public Services in the White Paper : The main divisions of the Public Services will be: (1) The All India Services (including the the Indian Civil Service, the Indian Police, the Indian Forest Service and the Indian Service of Engineers; (2) The Provincial Services and (3) the Central Services (including the Railway Services, the Indian Post and Telegraphic Services and the Imperial Customs Services).

All persons appointed by the Secretary of State in Council cannot be dismissed from the service by any authority subordinate to the Secretary of State in Council. Their pay will be made subject to the vote of the Legislature; and, they will have an ultimate right of appeal to the Secretary of State in Council. It is proposed to provide for such rights even after the commencement of the Constitution Act. (Paras 70, 71, Introduction.)

Merits and demerits of these rights have been discussed while considering the questions of and incidental to the Diarchy at pages 107 to 120 *ante*.

412(a). Orders in Council : The existing system of making appointments by the Secretary of State will continue till His Majesty by Order in Council will designate another authority for the purpose.

412(b). Statutory Enquiry : At the expiration of five years from the commencement of the Constitution Act, a Statutory Enquiry will be held into the question of future recruitment for those Services, except the Foreign Department and the Ecclesiastical Department. (Para 180, Proposals.)

Other Provisions, in this behalf, are contained in paras 190 to 194 of Proposals.

The decision on the result of this enquiry, with which the Government of India will be associated, will rest with His Majesty's Government, and be subject to the approval of both Houses of Parliament. (Para 189, Proposals.)

412(c) Public Service Commission : There will be a Federal Public Service Commission and Provincial Public Service Commission for each Province, but by agreement the Provincial Commission will be enabled to serve two or more Provinces jointly. (Para 195 to 201, Proposals.)

CHAPTER IX

THE JUDICIARY & ECCLESIASTICAL ESTABLISHMENT

I. INDIAN HIGH COURTS

Sec. 413. Constitution of High Courts: Indian High Courts are generally established by the respective Letters-Patent. Each High Court shall have a Chief Justice and as many other Judges as His Majesty may think fit to appoint, but the maximum number of Judges (including permanent, acting and additional) including the Chief Justice shall be twenty. A Chief Justice must be a Barrister; neither an Advocate nor a Pleader can hold the permanent office of a Chief Justice though both of them can *act* as a Chief Justice for short periods. Qualifications for holding the office of a Judge in the High Court are: (a) He must be a Barrister of at least five years' standing, or, (b) a member of the I. C. S. of at least ten years' standing having previously served as a District Judge, or, (c) a member of a Provincial Service of at least five years' standing, or, (d) he must be a pleader of a High Court of at least ten years' standing. At least one third of the total number of Judges must be Barristers and one third must be members of the I. C. S.

At present, there are High Courts at Bombay, Calcutta, Madras, Allahabad, Lahore, Patna and Rangoon. All these are established by the respective Letters-Patent granted by the Crown. His Majesty is empowered to establish additional High Courts with such jurisdiction, powers, etc., as he thinks necessary.

The Indian Legislature can abolish any High Court with the previous sanction of the Secretary of State in Council.

414. Case Law: Proviso to sec. 101 of the Act does not mean that an appointment of temporary Judges can only be made for periods not exceeding two years in all. *Kanda Swami vs. Muttru*, 33 Mad. L. J. 787. The usual strength of a High Court consisted of a Chief Justice and Puisne Judges. Owing to the retirement of one of them, the Court consisted of an Acting Chief Justice and five Puisne Judges of whom two were Barristers and two were members of the Civil Service. On these facts, it was held by the Court that the Constitution of the High Court did not offend against sec. 101 of the Act. 9 All. 625, F.B. 1 U. P. L. R. (H. C.) 38.

102 415 Office during pleasure: Every Judge of a High Court holds his office during His Majesty's pleasure, but any Judge of any High Court except that of Calcutta, can tender his resignation to the Local Government; a Judge of the Calcutta High Court can tender his resignation to the Governor-General in Council.

416. Additional Judges : The Governor-General in Council may appoint additional Judges of any High Court for a period not exceeding two years, as may be required. **Sec. 101 2(i)**

Principle of appointment : It must be admitted that it is a good principle to recruit Judges from the Bar, either English or Indian. It is doubtful whether it is desirable to appoint additional judges. The reasons twofold. Such additional judges will be recruited from the Bar; a good practising counsel will not like to give up his practice for a temporary period; a person once appointed a High Court Judge should not return to the Bar again. Once he is promoted to the Bench, it is desirable that he should bid farewell to the Bar. It is not desirable that a person should be connected alternately with the Bench and active surroundings of litigation. Very recently, lawyers in some provinces passed a resolution to that effect. **304**

Acting appointments : If a vacancy occurs in the office of the Chief Justice or that of a Judge, the Governor-General in Council in the case of the Calcutta High Court and the Local Government, in other cases, shall appoint a person to act as a Judge as the case may be during the period of vacancy. Another Judge of the same High Court—the most senior Judge for the time being—is appointed to act as a Chief Justice. In the case of a Judge, the Local Government may appoint a person who could answer the qualifications laid down in this Act. **105**

Principle of Tenure : It has been noted above that a High Court Judge remains in office during the Crown's pleasure. This principle does not seem to be sound. As in England, they should be allowed to hold office during *good behaviour*, so that they could be removed only in consequence of a conviction for some offence or on the address of both Houses of Parliament. The tenure-during good behaviour—would act as a great constitutional safe-guard against executive interference with the administration of justice. **102**

417. Precedence of High Court Judges : The Chief Justice shall have precedence and rank before the other Judges of the same Court and all other Judges according to the seniority of their appointments, unless otherwise provided for in their Patents. **103**

The Chief Justice has rank and precedence immediately after the Governor, and, other Judges after the Members of the Executive Council.

418. Salaries, etc : The Secretary of State in Council are empowered to fix and alter salaries, allowances, etc., and expenses for equipment and voyage of the Chief Justice and other Judges of High **104**

Sec. Courts. No change shall be made in the salary of a Judge who is already in office. Similarly, they are empowered to pay the personal legal representatives of a Judge-designate, if he dies on voyage or within six months after his arrival in this country, such sum of money which may amount to one year's salary inclusive of what he has already got. Similarly, if he dies in harness and after the expiration of six months, they are empowered to pay six months' salary.

106 419. **Jurisdiction: Ordinary Original Civil Jurisdiction:** O. O. C. J. means jurisdiction within such local limits as from time to time be declared and prescribed by any law to receive, try and determine suits of every description. The suits could be originally filed in the High Court if they have only such original jurisdiction. Bombay, Calcutta and Madras have got such O. O. C. J. The other High Courts have got only appellate jurisdiction, *i. e.*, they should hear appeals against and review the judgements and orders of their subordinates, but they cannot receive, try and determine original suits

Extraordinary O. C. J. includes the power to remove, try and determine suits being or falling within the jurisdiction of Subordinate Courts. This power is exercised by all the High Courts.

O. O. Cr. J. Ordinary Original Criminal Jurisdiction is granted to Bombay, Calcutta and Madras High Courts. Calcutta High Court has such jurisdiction within the local limits of the town of Calcutta, whereas Bombay and Madras have got such jurisdiction within the limits of their O. O. C. J. and also in respect of persons beyond such limits over whom they have criminal jurisdiction at the date of the respective Letters-Patent. The O. O. Cr. J. is the original jurisdiction to try and determine cases (with the help of a jury) in respect of all persons committed to the High Court Sessions in due course of law by committing Magistrates (or Courts).

Extraordinary O. Cr. J., is exercised in respect of all persons residing within the jurisdiction of all Subordinate Courts of the Chartered High Court and on charges preferred by the Advocate-General specially empowered in this behalf.

In the case of O. O. Cr. J. there is no right of appeal but a trying (Sessions) Judge of the High Court may, in his own discretion, reserve any point of law for the opinion of the Appeal Court. No appeal lies also to the Privy Council, but it may interfere in case of extreme necessity and absolute failure of justice.

Testamentary and Intestate Jurisdiction: These High Courts have got jurisdiction to grant Letters of Administration and Probate of Wills. Such jurisdiction is called T. & I. J.

Matrimonial Jurisdiction : Jurisdiction to receive, try and determine matrimonial petitions, *i. e.*, petitions for divorce, etc., is called Matrimonial Jurisdiction. Sec. 106

Insolvency Jurisdiction : Jurisdiction to receive, try and determine petitions under the Insolvency Act is called Insolvency Jurisdiction.

Admiralty Jurisdiction : These Courts have admiralty jurisdiction also. The several High Courts have such jurisdiction, original and appellate, including Admiralty Jurisdiction, in respect of offences committed on the Seas and all such powers and authorities over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers and power to make rules for regulating the practice of the Court. The Letters-Patent may be amended or altered by the Crown.

420. Case Law : The High Court has powers, apart from sec. 115 of the Civil P. C., to call for the proceedings of any Subordinate Court by virtue of sec. 106 and 130 of the Act. *The B. S. N. & Co. vs. Vasudeo*, 29 Bom. L. R. 1551. No appeal lies from the decision of a Judge to whom a case is referred under some Act for final decision. *Gangaram vs. Chief Court of Revenue Authority*. 29 Bom. L. R. 1511. The Chief Authority is under an obligation to refer a serious question of law under sec. 51 of the Indian Income Tax Act to the High Court; *Alcock vs. Chief Revenue Authorities*. 25 Bom. L. R. 920 P. C. See *B. E. S. T. & Co., vs. Collector of Madras*. 35 Mad. L. J. 23.

421. Powers of High Courts with respect to subordinate Courts: 107
Each of the High Courts has got powers of superintendence over all Courts subject to its appellate jurisdiction and may (a) call for returns; (b) direct the transfer of any suit or appeal from one Court to another Court of equal or superior jurisdiction; (c) frame and issue general rules and forms; (d) prescribe forms for keeping books, etc.; (e) and settle tables of fees to be allowed to the Sheriff, attorney, etc. These rules, tables, etc., must not be inconsistent with the provisions of any law and forms must require the previous sanction of the Governor-General in the case of the Calcutta High Court and that of the Local Government in the case of other High Courts.

422. Case Law. Although the provision regarding the powers of superintendence ordinarily given by the Criminal Procedure Code to the High Court can be repealed by an Ordinance, the High Court can exercise similar powers under sec. 107 of the Act; these powers are to a certain extent limited, but the High Court is certainly empowered to invoke the assistance of sec. 107 in the case of an extreme legal necessity.

Sec. ty; (As per Beaumont C. J. and Broomfield J., Nanavaty J. differing). In
107 Re: Phansalker, 34 Bom. L. R. 1523. In the said case, the Advocate, General for the Crown contended that sec. 106 should be read subject to sec. 107; and therefore the operation of the powers given under sec. 107 can also be temporarily suspended by an Ordinance; but the contention was over-ruled by their Lordships who held that the provisions of sec. 107 cannot be repealed by any law passed by the Indian Legislature. Consequently, the Viceroy cannot promulgate an Ordinance repealing the said sec. 107. *Ibid.* See *Malukdhari vs. Jaisari*, 30 All. 612; *Kumarchandra vs. Basar*, 22 C. W. N. 627; *Raghunath vs. Azari*, 2 Patna L. J. 130; In Re: V. Krashanna Swami, 35 Mad. 512; 1 Patna L. J. 467; 4 Patna L. J. 20; 3 Patna L. J. 382. The High Court has Jurisdiction to interfere in revision, with an order of a Munsif punishing a party for contempt. *Kadhuri vs. Emperor*, 42 All. 29. The High Court has no general power of superintendence in respect of the proceedings taken under Ch. 12th of the Cr. P. C. *Surendranath vs. Emperor*, 40 All. 364; *Moiram vs. Mrijan*, 24 C. W. N. 97; 19 Cal. 127; 16 All. L. J. 189; *Sakkaval vs. Emperor*, 41 All. 302. Under this section, the High Court can interfere with the order made under sec. 145 of the Cr. P. C. *Alimahomed vs. Piggot*; 32 Cal. L. J. 270; *The Indian Iron & Steel Co. vs. Bansu*, 32 Cal. L. J. 54; 41 Mad. 318; 14 Cal. 361; 26 Cal. 188; 25 All. 537; 24 Bom. 527; 36 Mad. 275. The applicability of sec. 107 to proceedings under the Legal Practitioners Act is discussed in the matter of *Janak Kishore*, 1 Patna L. J. 576; proceedings under the Land Acquisition Act are judicial and are open to revision under sec. 107; 12 Cal. W. N. 241; *Parmeshwar vs. Land Acquisition Collector*, 42 Mad. 231; 33 Bom. L. R. 1007. Section 107 empowers the High Court to prevent the perversion by the Magistrate of the law laid down in sec. 144 Cr. P. C. 7 C. W. N. 140; 11 C. W. N. 79; 5 Cal. 7; 25 Cal. 852; *Govind vs. Perumal*, 25 Mad. L. J. 370. Where a Court dismisses a suit on the plaintiff's failure to amend a plaint without giving him an opportunity to continue the trial with the plaint as it was, it refuses to exercise a jurisdiction and its order is open to revision under sec. 107; 4 Patna L. J. 277; 4 Patna L. J. 57 and 4 Patna L. J. 371; 20 C. W. N. 1080; 42 Cal. 926; 16 Cr. L. J. 375.

423. White Paper: Proposal to repeal sec. 107: The Federal Legislature will have power to regulate the powers of superintendence exercised by High Courts over subordinate Courts in the Provinces. In *Phansalker vs. The Crown*, 34 Bom. L. R. 1523, it was held that the Indian Legislature cannot pass any Act repealing sec. 107. They further held that the Ordinance cannot, therefore, repeal the provision of that section. But by this proposal, the Governor-General by

the Ordinance will be able to suspend the Provisions of that section and deprive the High Courts of their powers of superintendence. (Para 175, Proposals.) Sec 107

Distribution of work: Each High Court may in its own rules provide as it thinks fit for the exercise of the original and appellate jurisdiction. The Chief Justice decides distribution of work amongst the other Judges. 108

We have already considered under the Chapter on the Government of India that the Governor-General in Council may transfer any territory or place from the jurisdiction of one to the jurisdiction of any other High Court. 109

425. Exemption: We have also considered that the Governor-General, Governors, Members of the Executive Council and such other officers, are exempted from the jurisdiction of High Courts. But they are not exempted from the jurisdiction of any competent court in England in respect of certain acts amounting to misdemeanour, which are as follows: 110
111

426. Certain Acts to be Misdemeanour: If any person holding office under the Crown in India does any of the following things, that is to say—(1) *Oppression*—if he oppresses any British subject within his jurisdiction or in the exercise of his authority; or (2) *wilful disobedience*—if (except in case of necessity, the burden of proving which shall be on him) he wilfully disobeys, or wilfully omits, forbears or neglects to execute, any orders or instructions of the Secretary of State; or (3) *Breach of duty*—if he is guilty of wilful breach of the trust and duty of his office; or (4) *Trading*—if being the Governor-General, or Governor, Lieut.-Governor or Chief Commissioner or a Member of the Executive Council of the Governor-General or of a Governor or of a Lieut.-Governor or being a Minister appointed under this Act, or being a person employed or concerned in the collection of revenue or the administration of justice, he is concerned in, or has any dealings or transactions by way of trade or business in any part of India for the benefit either of himself or of any other person, otherwise than as a shareholder in any joint stock company or trading corporation; or (5) *Receiving Present*—if he demands, accepts or receives, by himself or another in the discharge of his office, or any promise of the same, except in accordance with such rules as may be made by the Secretary of State as to the receipt of presents, and except in the case of fees paid or payable to barristers, physicians, surgeons and chaplains in the way of their respective profession, he shall be guilty of misdemeanour; and if he is convicted of having demanded, accepted or received, any 124

Sec. such gift, gratuity or reward, the same or the full value thereof shall be
124 forfeited to the Crown, and the Court may order that the gift, gratuity, or any part thereof be restored to the person who gave it, or be given to the prosecutor, or informer and that the whole or any part of any fine imposed on the offender be paid or given to the prosecutor or informer as the Court may direct.

Provided that notwithstanding anything in this Act, if any member of the Governor-General's Executive Council or any member of any
80 Local Government was at the time of his appointment concerned or engaged in any trade or business, he may during the term of his office with the sanction in writing of the Governor-General or in the case of Ministers, of the Governor of the Province, and in any case subject to
101 such general conditions and restrictions as the Governor-General in
111 Council may prescribe, retain his concern or interest in that trade or business, but shall not during that term, take part in the direction or management of that trade or business.

125 **427. Loans to Princes or Chiefs:** (1) If any European British Subject without the previous consent in writing of the Secretary of State in Council or of the Governor-General in Council or of a Local Government, by himself or another (a) lends any money or other valuable thing to any Prince or Chief in India; or (b) is concerned in lending money to, or raising or procuring money for any such Prince or Chief or becomes security for the repayment of any such money; or (c) lends any money or other valuable thing to any other person for the purpose of lending to any such Prince or Chief; or (d) takes, holds or is concerned in any bond, note or other security granted by any such Prince or Chief, for the repayment of any loan or money, herinbefore referred to; he shall be guilty of misdemeanour. (2) Every bond, note or security for money, of whatsoever kind or nature taken, held or enjoyed, either directly or indirectly for the use and benefit of any European British Subject contrary to the intent of this section, shall be void.

126 **428. Carrying on Dangerous Correspondence:** If any person carries on mediately or immediately any illicit correspondence, dangerous to the peace or safety of any part of British India, with any Prince, Chief, landholder or other person having authority in India or with the Commander, Governor or Resident of any foreign European settlement in India or any correspondence contrary to the rules and orders of the Secretary of State or the Governor-General in Council or a Governor in Council, he shall be guilty of a misdemeanour; and the Governor-General or the Governor may issue a warrant for securing and detaining in custody any person suspected of carrying on any such correspondence;

(2) if on examination taken on oath in writing of any credible witness before the Governor-General in Council, there appears reasonable ground for the charge, the Governor-General or the Governor may commit the person suspected or accused to safe custody and shall within a reasonable time not exceeding five days, cause to be delivered to him a copy of the charge on which he is so committed; (3) the person charged may deliver his defence in writing with a list of such witnesses as he may desire to be examined in support thereof; (4) the witnesses in support of the charge and of the defence shall be examined and cross-examined on oath in the presence of the person charged, and their deposition and examination shall be taken down in writing; (5) if notwithstanding the defence there appears to the Governor-General in Council or the Governor in Council reasonable grounds for the charge and for continuing the confinement, the person charged shall remain in custody until he is brought to trial in India or sent to England for trial; (6) all such examinations and proceedings or attested copies thereof under the seal of the High Court shall be sent to the Secretary of State, as soon as may be, in order to their being produced in evidence on the trial of the person charged in the event of his being sent for trial to England; (7) if any such person is to be sent to England the Governor-General or the Governor, as the case may be shall cause him to be so sent at the first convenient opportunity, unless he is disabled by illness from undertaking the voyage, in which case he shall be so sent as soon as his state of health will safely admit thereof; (8) the examination and proceedings transmitted in pursuance of this section shall be received as evidence in all Courts of Law, subject to any just exceptions as to the competency of the witnesses.

429. Prosecution of Offences in England: If any person holding office under the Crown in India commits any offence under this Act or any offence against any person within his jurisdiction or subject to his authority, the offence may without prejudice to any other jurisdiction be enquired of, heard, tried and determined before His Majesty's High Court of Judicature in London and be dealt with as if committed in the County of Middlesex. **127**

430. Limitation for Prosecution in British India: Every prosecution before a High Court in British India in respect of any offence referred to in the last foregoing section must be commenced within six years after the commission of the offence **128**

431. Penalties: If any person commits any offence referred to in this Act, he shall be liable to such fine or imprisonment or both as the Court thinks fit and shall be liable at the discretion of the Court to be incapable of serving the Crown in India in any office, civil or military; **129**

Sec. and if he is convicted in British India by a High Court, the Court may order that he be sent to Great Britain.

114 **432. Advocate-General :** It is already noted that the Crown by warrant under His Royal Sign Manual, appoints an Advocate-General for each of the Presidencies of Bombay, Bengal and Madras. The Advocate-General is empowered to take such proceedings on behalf of the Crown as may be taken by the Attorney-General in England. In case of Bengal, the Government of India is empowered to make temporary or acting appointments; and in the case of Bombay and Madras, the respective Local Governments are so empowered.

433. Case Law : The term Advocate-General means the person who, for the time being, holds the office. If the permanent incumbent either goes on leave, or on deputation, or relinquishes his office even temporarily for any other reason, and if another person is appointed in his place as provided for in sec. 144, such holder of the office is 'Advocate-General' and not the permanent incumbent. The person so appointed to act as 'Advocate-General' is entitled to all the duties, rights, obligations and privileges of that office. 33 Bom. L. R. 1500.

434. Judicial Commissioners : At some places there are no High Courts, e. g., in Sind, Nagpur, Kathiawar, etc.; in such places Judicial Commissioners are appointed by the Government of India, with the powers of a High Court.

107 **435. Subordinate Judiciary; Subordinate Criminal Courts:** Every Province is divided into Sessions divisions which are sub-divided into magisterial divisions. If there is more work in a division, the Sessions Judge is assisted by an Additional or an Assistant Sessions Judge.

VS : Their powers are defined by the Criminal Procedure Code.

436. Subordinate Civil Courts: The Province is divided into several districts having District and Subordinate Judges to administer civil justice. Their jurisdiction, powers and functions are defined by the Civil Procedure Code.

22 : **437. Privy Council :** In civil matters an appeal lies from a final appellate decree of the High Court or any other Court of final appellate jurisdiction, and from any other decree, if the case is certified by the High Court to be fit for appeal to the Judicial Committee of the Privy Council. The Civil Procedure Code lays down under what circumstances and in what cases an appeal would lie to the Privy Council. If the High Court refuses leave to appeal to the King in Council, the Privy Council has right to grant Special Leave if it so thinks fit. All the Decrees and Orders of the Privy Council are drawn up in the name of the King.

This Judicial Committee of the Privy Council sits in England and adjudicates upon matters as stated above. It is said that it is more difficult to be a member of the Privy Council than to be a Peer. At present two Indians have the honour of sitting on the Judicial Committee of the Privy Council. Sec.
107

438. Suggestion of Supreme Court: It is urged by some Indian schools of political thought and by some Indian lawyers that a *Supreme Court* should be established in India with the powers and functions of the Privy Council. It is also urged that about two or three English Privy Councillors may be invited to come to India and preside over the Bench of the proposed Supreme Court during cold weather, and the sittings of the Supreme Court may be held only during cold weather. If these suggestions are accepted and a Supreme Court is established on that basis, it is certain that justice would be cheaper and speedier. Proposals regarding the establishment of a Supreme Court are published in the White Paper.

439 Recommendations of the India Statutory Commission regarding High Courts [Vol. II, Paras 341 to 349]: From the observations, one must have noted that the High Court at Calcutta is mainly under the jurisdiction of the Central Government; whereas the other High Courts are under the jurisdiction of the Local Governments, except in the case of additional and permanent appointments of High Court Judges.

The Commission recommends High Court to be the Central subject and to be placed under the Central control.

The superintendence, direction and control of High Courts over the subordinate judiciary will however remain the same

440. Proposals in the White Paper regarding judiciary, i.e., The Federal Court, The Supreme Court and The Provincial High Court.

Federal Courts: Principle: In a constitution created by the Federation of a number of separate political units, a Federal Court has always been recognised as an essential element to interpret authoritatively (1) the Federal Constitution itself; (2) the conflicting laws and (3) the conflicting spheres.

440(a). Proposed various kinds of Jurisdiction: It is proposed that the Federal Court should have both an original and an appellate Jurisdiction. On its original side, it will determine judicial disputes between the Federation and any Federal Unit. On its appellate side which will be an exclusive jurisdiction, it will hear appeals from any High Court or State Court on the question involving the interpretation

Sec. of the Constitution Act. Provision is sought to be made for an appeal
W.P. to the King in Council against the decision of the Federal Court.
 (Paras 62, 63, 64, Introduction and paras 155, 156, Proposals.)

440(b). Number of Judges: Appointment: Special case on facts stated: Other consequential proposals are considered in para 65 of the Introduction and laid down in paras 157 to 162 of the Proposals.

440(c). The Supreme Court: It is proposed to create a Supreme Court of Appeal for British India. In certain matters, both Civil and Criminal, it will be a final Court of Appeal; and in certain matters it shall have concurrent jurisdiction with the Privy Council. It is also proposed to provide for appeals to the King in Council against the decision of the Supreme Court. (Para 66, Introduction; para 163, Proposals.)

440(d) Supreme Court: Its Jurisdiction and Powers: It will be a Court of Appeal from the High Courts in British India. (Para 165, Proposals). Such appeals in civil cases will be subject to the provisions now applicable to appeals to the King in Council. (Para 166, Proposals). It will also be a Criminal Court of Appeal; appeals in criminal cases will lie only where a sentence of death has been passed or where an acquittal on a criminal charge has been reversed by a High Court; in the latter case, a certificate by the High Court, that it is a fit case, will be necessary. (Para 166, Proposals). A direct appeal from a High Court to the King in Council will, therefore, be barred. An appeal from the Supreme Court to the King in Council will be allowed in civil cases only on leave by Supreme Court or by special leave. No criminal appeal will lie to the King in Council, not even by special leave. (Para 167, Proposals.)

The President: The Chief Justice of such a Court will be known as the President. (Para 164, Proposals.)

440(e). Appointment, etc.: The President and Judges of the Supreme Court will be appointed by His Majesty and will hold office during good behaviour. The term of office will cease on their attaining the age of 63 years.

440(f). Tenure: An important change is proposed by providing that Judges will continue in office during good behaviour and not during pleasure.

440(g). The Provincial High Courts: Proposed changes: (1) The existing provision regarding certain proportion of Barristers, I.C.S., Advocates and Pleaders, is proposed to be repealed. There will be no reservation for any class. (2) They will continue in office during good behaviour and not during pleasure; (3) they will continue in office

upto their attaining the age of 63 years; (4) any person qualified to **W.P.** be a Judge will be eligible for the office of Chief Justice; (5) the salaries, etc., will be regulated by Orders in Council; (6) the power to appoint temporary additional Judges and also to fill in temporary vacancies in High Courts will be vested in the Governor-General in his discretion; and (7) the Courts can be deprived of their power of superintendence as provided for under the existing sec. 107, by any Act of the Federal Legislature or any Ordinance by the Governor-General. (Paras 168 to 175, Proposals.)

II. ECCLESIASTICAL ESTABLISHMENT

441. Sections 115, 116, 117, 118, 119, 120 and 121 were repealed **115**
by schedule 1 of 17 and 18 Geo. V, ch. 40; but, similar provisions **to**
were embodied in the said Act of Parliament. (17 & 18 Geo. V, ch. 40.) **121**

The establishment is primarily maintained for the purpose of providing the administration of religion for British-born European servants of the Crown. The Bishops of Bombay, Bengal and Madras are appointed by the Crown by Letters-Patent. They are paid out of the revenues of India such salaries, allowances, expenses of visitations, etc., as fixed by the Secretary of State in Council.

The Bishop of Calcutta is the Metropolitan Bishop in India and exercises such ecclesiastical functions as the Crown by Letters Patent may direct.

Provisions are made to make payment to personal legal representatives of a Bishop or a Bishop-designate in case of his death, by the Secretary of State in Council.

Provisions are also made to grant a pension to any Bishop.

His Majesty may make rules regarding leave of absence for Bishop of Bombay, Calcutta and Madras.

Provision is made for the establishment of Chaplains of the Church **122**
of Scotland in the three Presidencies.

Provision is also made granting such sums of money as may be **123**
expedient for the purposes of instructions or for the maintenance of places of worship, by the Government of India with the sanction of the Secretary of State in Council.

It is urged that the State should not defray the expenses from public treasury, in any event, for an establishment exclusively for only any one religious class.

442. Proposals in the White Paper: The Ecclesiastical Department will be a Reserved Department under the direct administration of the Governor-General. The Legislature will not have power or authority to interfere with the administration of this department. Even on the financial side, the Legislature will not have any voice. (Paras 14, 15, 25 and 26, Introduction; and paras 6, 11, 18, 21 and 42, Proposals.)

GOVERNMENT OF INDIA ACT

AS AMENDED UPTO FEBRUARY 1934

An Act to consolidate enactments relating to the Government of India

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I

HOME GOVERNMENT

THE CROWN

1. Government of India by the Crown: The territories for the time being vested in His Majesty in India are governed by and in the name of His Majesty the King Emperor of India, and all rights which, if the Government of India Act, 1858, had not been passed, might have been exercised by the East India Company in relation to any territories, may be exercised by and in the name of His Majesty as rights incidental to the government of India.

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2. The Secretary of State: (1) Subject to the provisions of this Act, the Secretary of State has and performs all such or the like powers and duties relating to the government or revenues of India, and has all such or the like powers over all officers appointed or continued under this Act, as, if the Government of India Act, 1858, had not been passed, might or should have been exercised or performed by the East India Company, or by the Court of Directors or Court of Proprietors of that Company, either alone or by the direction or with the sanction or approbation of the Commissioners for the Affairs of India, in relation to the government or those revenues and the officers and servants of that Company, and also all such powers as might have been exercised by the said Commissioners alone.

(2) In particular, the Secretary of State may, subject to the provisions of this Act ¹[or rules made thereunder], superintend, direct and control all acts,

¹ These words were inserted by part II of Sch. II of the Government of India Act 1919 (9 and 10 Geo. 5, ch. 101).

operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India.

¹[(3) The salary of the Secretary of State shall be paid out of moneys provided by Parliament, and the salaries of his under secretaries and any other expenses of his department may be paid out of the revenues of India or out of moneys provided by Parliament.]

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3. The Council of India: (1) The Council of India shall consist of such number of members, not less than ²[eight] and not more than ²[twelve], as the Secretary of the State may determine:

³[Provided that the Council as constituted at the time of the passing of the Government of India Act, 1919, shall not be affected by this provision, but no fresh appointment or re-appointment thereto shall be made in excess of the maximum prescribed by this provision.]

(2) The right of filling any vacancy in the Council shall be vested in the Secretary of State.

(3) Unless at the time of an appointment to fill a vacancy in the Council [one half] of the then existing members of the Council are persons who have served or resided in ⁴[...] India for at least ten years, and have not last left ⁶[...] India more than five years before the date of their appointment, the person appointed to fill the vacancy must be so qualified.

(4) Every member of the Council shall hold office except as by this section provided, for a term of ⁷[five] years.

⁸[Provided that the tenure of office of any person who is a member of the Council at the time of the passing of the Government of India Act, 1919, shall be the same as though that Act had not been passed.]

(5) The Secretary of State may, for special reasons of public advantage, re-appoint for a further term of five years any member of the Council whose

1. This sub-section was substituted by part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). 2. The words "eight" and "twelve" were substituted for the words "ten" and "fourteen" respectively by *ibid.* 3. This proviso was added by *ibid.* 4. The word "one-half" was substituted for the word "nine" by *ibid.* 5. The word "British" was omitted by *ibid.* 6. The word "British" was omitted by Sch. 1 of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37). 7. The word "five" was substituted for "seven" by part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101) 8. This proviso was inserted by *ibid.*

term of office has expired. In any such case the reasons for the re-appointment shall be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament. Save as aforesaid, a member of the Council shall not be capable of re-appointment.

(6) Any member of the Council may, by writing signed by him, resign his office. The instrument of resignation shall be recorded in the minutes of the Council.

(7) Any member of the Council may be removed by His Majesty from his office on an address of both Houses of Parliament.

¹[(8) There shall be paid to each member of the Council of India the annual salary of twelve hundred pounds :

Provided that any member of the Council who was at the time of his appointment domiciled in India shall receive, in addition to the salary hereby provided, an annual subsistence allowance of six hundred pounds.

Such salaries and allowances may be paid out of the revenues of India or out of moneys provided by Parliament.

(9) Notwithstanding anything in any Act or rule, where any person in the service of the Crown in India is appointed a member of the Council before the completion of the period of such service required to entitle him to a pension or annuity, his service as such member shall, for the purpose of any pension or annuity which would have been payable to him on completion of such period, be reckoned as service under the Crown in India whilst resident in India.]

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4. **Seat in Council disqualification for Parliament:** No member of the Council of India shall be capable of sitting or voting in Parliament.

5. **Duties of Council:** The Council of India shall, under the direction of the Secretary of State, and subject to the provisions of this Act, conduct the business transacted in the United Kingdom in relation to the government of India and the correspondence with India

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1. Sub-sections (8) & (9) of section 8 were substituted for old sub-section (8) by Part 11 of Sch. 11 of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101). 2. The remaining words were omitted by *ibid.*

6. Powers of Council: (1) All powers required to be exercised by the Secretary of State in Council, and all powers of the Council of India, shall be exercised at meetings of the Council at which ¹[such number of members are present as may be prescribed by general directions of the Secretary of State.]

(2) The Council may act notwithstanding any vacancy in their number.

7. President and vice president of Council: (1) The Secretary of State shall be the president of the Council of India, with power to vote.

(2) The Secretary of State in Council may appoint any member of the Council to be vice-president thereof, and the Secretary of State may at any time remove any person so appointed.

(3) At every meeting of the Council the Secretary of State, or, in his absence, the vice president, if present, or, in the absence of both of them, one of the members of the Council, chosen by the members present at the meeting, shall preside

8. Meetings of Council: Meetings of the Council of India shall be convened and held as and when the Secretary of State directs, but one such meeting, at least shall be held in every ²[month.]

9. Procedure at meetings: (1) At any meeting of the Council of India at which the Secretary of State is present, if there is a difference of opinion on any question, except a question with respect to which a majority of votes at a meeting is by this Act declared to be necessary, the determination of the Secretary of State shall be final.

(2) In case of an equality of votes at any meeting of the Council, the person presiding at the meeting shall have a second or casting vote.

(3) All acts done at a meeting of the Council in the absence of the Secretary of State shall require the approval in writing of the Secretary of State.

(4) In case of difference of opinion on any question decided at a meeting of the Council, the Secretary of State may require that his opinion and the reasons for it be entered in the minutes of the proceedings, and any member of the Council, who has been present at the meeting, may require that his opinion, and any reasons for it that he has stated at the meeting, be also entered in like manner.

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10. Committees of Council and business: The Secretary of State may constitute committees of the Council of India for the more convenient transaction of business, and direct what departments of business are to be under those Committees respectively, and generally direct the manner in which ³[the business of the Secretary of State in Council or the Council of India shall be

1. These words were substituted for "not less than five members are present" by Part II of Sch. II of the Government of India Act, (9 & 10 Geo. 5, ch. 101) 2. The word "month" was substituted for the word "week" by *ibid.* 3. These words were substituted for "all business of the Council or Committees thereof is to be transacted" by *ibid.*

transacted, and any order made or act done in accordance with such direction shall, subject to the provisions of this Act, be treated as being an order of the Secretary of State in Council].

[11. **Correspondence between Secretary of State and India:** Subject to the provisions of this Act, the procedure for the sending of orders and communications to India and in general for correspondence between the Secretary of State and the Governor-General in Council or any local government shall be such as may be prescribed by order of the Secretary of State in Council.]

15. Communication to Parliament as to orders for commencing hostilities: When any order is sent to India directing the actual commencement of hostilities by His Majesty's forces in India, the fact of the order having been sent shall, unless the order has in the meantime been revoked or suspended, be communicated to both Houses of Parliament within three months after the sending of the order, or if Parliament is not sitting at the expiration of those three months, then within one month after the next meeting of Parliament.

16. [Correspondence by Governor-General with Secretary of State.] (Omitted by Part III of Sch. II of 9 & 10 Geo. 5, ch. 101.)

ESTABLISHMENT OF SECRETARY OF STATE

17. Establishment of Secretary of State: (1) No addition may be made to establishment of the Secretary of State in Council, to be laid before both Houses of Parliament within fourteen days after the making thereof, or if Parliament is not then sitting, then within fourteen days after the next meeting of Parliament.

(2) The rules made by His Majesty for examinations, certificates, probation or other tests of fitness, in relation to appointments to junior situations in the civil service, shall apply to such appointments on the said establishment.

(3) The Secretary of State in Council may, subject to the foregoing provisions of this section, make all appointments to and promotions in the said establishment, and may remove any officer or servant belonging to the establishment.

18. Pensions and gratuities: His Majesty may, by warrant under the Royal Sign Manual, countersigned by the Chancellor of the Exchequer, grant to any secretary, officer or servant appointed on the establishment of the Secretary of State in Council, such compensation, superannuation or retiring allowance, or to his legal personal representative such gratuity, as may respectively be granted to persons on the establishment of a Secretary of State or to the personal representatives of such persons, under the laws for the time being in force concerning superannuation and other allowances to persons having held civil offices in the public service or to personal representatives of such persons.

1. Section 11 was substituted for old Sections 11 to 14 by Part I of Sch. II of the Govt. of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

MILITARY APPOINTMENTS

19. Military Appointments: (1) The Commander in Chief of His Majesty's forces in India is appointed by His Majesty by warrant under the Royal Sign Manual.

(2) ^a..... In the appointment of officers to His Majesty's army the same provision as heretofore, or equal provision, shall be made for the appointment of sons of persons who have served in India in the military or civil service of the Crown or of the East India Company.

RELAXATION OF CONTROL OF SECRETARY OF STATE

[**19A. Relaxation of Control of Secretary of State:** The Secretary of state in Council may, notwithstanding anything in this Act, by rules regulate and restrict the exercise of the powers of superintendence, direction and control vested in the Secretary of State and the Secretary of State in Council by this Act, or otherwise, in such manner as may appear necessary or expedient in order to give effect to the purposes of the Government of India Act, 1919.

Before any rules are made under this section relating to subjects other than transferred subjects, the rules proposed to be made shall be laid in draft before both Houses of Parliament and such rules shall not be made unless both Houses by resolution approve the draft either without modification or addition, or with modification or additions to which both Houses agree, but upon such approval being given the Secretary of State in Council may make such rules in the form in which they have been approved, and such rules on being so made shall be of full force and effect.

Any rules relating to transferred subjects made under this section shall be laid before both Houses of Parliament as soon as may be after they are made and if an address is presented to His Majesty by either House of Parliament within the next thirty days on which that House has sat after the rules are laid before it praying that the rules or any of them may be annulled, His Majesty in Council may annul the rules or any of them, and those rules shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.]

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1. Sub-section (1) of s. 19 was newly inserted by s. 3 of the Govt. of India (Leave of Absence Act, 1924 [14 & 15 Geo. 5, ch. 28]). 2. Certain words were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 3. Section 19A was inserted by Part I of ibid. 4. 54 Cal. 989 (1021-22).

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PART II

THE REVENUES OF INDIA

20. Application of revenues : (1) The revenues of India shall be received *or and in the name of His Majesty, and shall, subject to the provisions of this Act, be applied for the purposes of the government of India alone.*

(2) There shall be charged on the revenues of India alone –

- (a) all the debts of the East India Company; and
- (b) all sums of money, costs, charges and expenses which if the Government of India Act, 1858, had not been passed, would have been payable by the East India Company out of the revenues of India in respect of any treaties, covenants, contracts, grants, or liabilities existing at the commencement of that Act; and
- (c) all expenses, debts and liabilities lawfully contracted and incurred on account of the government of India; and
- (d) all payments under this Act ¹[except so far as is otherwise provided under this Act.]

(3) The expression the “revenues of India” in this Act shall include all the territorial and other revenues of or arising in British India, and, in particular:—

- (i) all tributes and other payments in respect of any territories which would have been receivable by or in the name of the East India Company if the Government of India Act, 1858, had not been passed; and
- (ii) all fines and penalties incurred by the sentence or order of any court of justice in British India, and all forfeitures for crimes of any movable or immovable property in British India; and
- (iii) all movable and immovable property in British India escheating or lapsing for want of an heir or successor, and all property in British India devolving as *bona vacantia* for want of a rightful owner.

(4) All property vested in, or arising or accruing from property or rights vested in His Majesty under the Government of India Act, 1858, or this Act, or to be received or disposed of by the Secretary of State in Council under his Act, shall be applied in aid of the revenues of India.

¹ These words were inserted by Part II of Sch. II of the Government of India Act, 1919, p 4 and 10 Geo. 5, ch. 101).

21. Control of Secretary of State over expenditure of revenues ;

¹[Subject to the provisions of this Act, and rules made thereunder], the expenditure of the revenues of India, both in British India and elsewhere, shall be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of those revenues, or of any other property coming into the possession of the Secretary of State in Council by virtue of the Government of India Act, 1858, or this Act, shall be made without the concurrence of a majority of votes at a meeting of the Council of India.

²[Provided that a grant or appropriation made in accordance with provisions or restrictions prescribed by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council shall be deemed to be made with the concurrence of a majority of such votes.]

22. Application of revenues to military operations beyond frontier ;

(1) Except for preventing or repelling actual invasion of His Majesty's Indian possessions, or under other sudden and urgent necessity, the revenues of India shall not without the consent of both Houses of Parliament, be applicable to defraying the expenses of any military operations carried on beyond the external frontiers of those possessions by His Majesty's forces charged upon those revenues.

³[(2) Where any naval forces and vessels raised and provided by the Governor-General in Council are in accordance with the provisions of this Act placed at the disposal of the Admiralty, the revenues of India shall not without the consent of both Houses of Parliament, be applicable to defraying the expense) of any such vessels or forces if and so long as they are not employed on Indian naval defence.

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23. Accounts of Secretary of State with Bank: (1) Such parts of the revenues of India as are remitted to the United Kingdom, and all money arising or accruing in the United Kingdom, from any property or rights vested in His Majesty for the purposes of the Government of India, or from the sale or disposal thereof, shall be paid to the Secretary of State in Council, to be applied for the purposes of this Act.

(2) All such revenues and money shall, except as by this section is provided, be paid into the Bank of England to the Credit of an account entitled "The Account of the Secretary of State in Council of India."

1. These words were inserted by Part II of Sch. II of the Government of India Act, 1919, (9 & 10 Geo. 5, ch. 101). 2. These words were added by Sch. I of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37). 3. This sub-section was added by the Government of India (Indian Navy) Act, 1927 (17 and 18, Geo. 5, ch. 81).

(3) The money placed to the credit of that account shall be paid out on drafts or orders, either signed by two members of the Council of India and countersigned by the Secretary of State or one of his under-secretaries or his assistant under-secretary, or signed by the accountant-general on the establishment of the Secretary of State in Council or by one of the two senior clerks in the department of that accountant-general and countersigned in such manner as the Secretary of State in Council directs; and any draft or order so signed and countersigned shall effectually discharge the Bank of England for all money paid thereon.

(4) The Secretary of State in Council may, for the payment of current demands, keep at the Bank of England such accounts as he deems expedient; and every such account shall be kept in such name and be drawn upon by such person, and in such manner as the Secretary of State in Council directs.

(5) There shall be raised in the books of the Bank of England such account as may be necessary in respect of stock vested in the Secretary of State in Council; and every such account shall be entitled "The Stock Account of the Secretary of State in Council of India."

(6) Every account referred to in this section shall be public account.

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24. Powers of attorney for sale or purchase of stock and receipt of dividends: The Secretary of State in Council, by power of attorney executed by two members of the Council of India and countersigned by the Secretary of State or one of his under-secretaries or his assistant under-secretary, may authorise all or any of the cashiers of the Bank of England—

(a) to sell and transfer all or any part of any stock standing in the books of the Bank to the account of the Secretary of State in council; and

(b) to purchase and accept stock for any such account; and

(c) to receive dividends on any stock standing to any such account; and, by any writing signed by two members of the Council of India and countersigned as afore-said, may direct the application of the money to be received in respect of any such sale or dividend:

Provided that stock shall not be purchased or sold and transferred under the authority of any such general power of attorney, except on an order in writing directed to the chief cashier and chief accountant of the Bank of England, and signed and countersigned as aforesaid.

25. Provision as to securities: All securities held by or lodged with the Bank of England in trust for or on account or on behalf of the Secretary of State in Council may be disposed of, and the proceeds thereof may be applied,

as may be authorised by order in writing signed by two members of the Council of India and countersigned by the Secretary of State or one of his under-secretaries or his assistant under-secretary, and directed to the chief cashier and chief accountant of the Bank of England.

26. Accounts to be annually laid before Parliament : (1) The Secretary of State in Council shall, within the first ¹[twenty eight days] during which Parliament is sitting next after the first day of May in every year, lay before both Houses of Parliament—

(a) an account, for the financial year preceding that last completed, of the annual produce of the revenues of India, distinguishing the same under the respective heads thereof, in each of the several provinces; and of all the annual receipts and disbursements at home and abroad for the purposes of the government of India, distinguishing the same under the respective heads thereof;

(b) the latest estimate of the same for the financial year last completed ;

(c) accounts of all stocks, loans, debts, and liabilities chargeable on the revenues of India at home and abroad, at the commencement and close of the financial year preceeding that last completed, the loans, debts and liabilities raised or incurred within that year, the amounts paid off or discharged during that year, the rates of interests borne by those loans, debts, and liabilities respectively and the annual amount of that interest;

²(d)²

(e) a list of the establishment of the Secretary of State in Council, and the salaries and allowances payable in respect thereof.

(2) If any new or increased salary or pension of fifty pounds a year or upwards has been granted or created within any year in respect of the said establishment, the particulars thereof shall be specially stated and explained at the foot of the account for that year.

(3) The account shall be accompanied by a statement prepared from detailed reports from each province, in such form as best exhibits the moral and material progress and conditions of India.

27. Audit of Indian accounts in United Kingdom : (1) His Majesty, by warrant under His Royal Sign Manual, countersigned by the Chancellor of the Exchequer, appoint a fit person to be auditor of the accounts of the Secretary of State in Council, and authorise that auditor to appoint and remove such assistants as may be specified in the warrant.

¹ These words were substituted for the words " fourteen days " by Sch I of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37), 2, Paragraph (d) was repealed by Sch. II of *ibid.*

(2) The auditor shall examine and audit the accounts of the receipt, expenditure and disposal in the United Kingdom of all money, stores and property applicable for the purposes of this Act.

(3) The Secretary of State in Council shall by the officers and servants of his establishment, produce and lay before the auditor such accounts accompanied by proper vouchers for their support, and submit to his inspection all books, papers and writings having relation thereto.

(4) The auditor may examine all such officers and servants of that establishment, being in the United Kingdom, as he thinks fit, in relation to such accounts and the receipt, expenditure or disposal of such money, stores and property, and may for that purpose, by writing signed by him, summon before him any such officer or servant.

(5) The auditor shall report to the Secretary of State in Council his approval or disapproval of the accounts aforesaid, with such remarks and observations in relation thereto, as he thinks fit, specially noting cases (if any) in which it appears to him that any money arising out of the revenues of India has been appropriated to purposes other than those to which they are applicable.

(6) The auditor shall specify in detail in his reports all sums of money, stores and property which ought to be accounted for, and are not brought into accounts or have not been appropriated in conformity with the provisions of the law, or which have been expended or disposed of without due authority, and shall also specify any defects, inaccuracies or irregularities which may appear in the accounts, or in the authorities, vouchers or documents having relation thereto.

(7) The auditor shall lay all his reports before both Houses of Parliament, with the account of the year to which the reports relate.

(8) The auditor shall hold office during good behaviour.

(9) There shall be paid to the auditor and his assistants, out of the revenues of India, ¹[or out of moneys provided by Parliament], such salaries as His Majesty, by warrant signed and countersigned as aforesaid, may direct.

(10) The auditor and his assistants (notwithstanding that some of them do not hold certificates from the Civil Service Commissioners) shall, for the purposes of superannuation, ²[or retiring] allowance ³, and their legal personal representatives shall for the purposes of gratuity, be in the same position as if ²[the auditor and his assistants] were on the establishment of the Secretary of State in Council.

1. These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101) 2. These words were inserted by Sch. I of the Government of India (Amendment), Act, 1916 (1 and 7 Geo. 5, ch. 37). 3. These words were substituted for the word "they" by *ibid.*

PART III

PROPERTY, CONTRACTS AND LIABILITIES

28. Power of Secretary of State to sell, mortgage and buy property :

(1) The Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, sell and dispose of any real or personal estate for the time being vested in His Majesty for the purposes of the government of India, and raise money on any such real ¹[or personal] estate by way of mortgage, ¹[or otherwise], and make the proper assurances for any of those purposes, and purchase and acquire any property.

(2) Any assurance relating to real estate, made by the authority of the Secretary of State in Council, may be made under the hands and seals of ²[two] members of the Council of India.

(3) All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the government of India.

29. Contracts of Secretary of State : (1) ³[Subject to the provisions of this Act regarding the appointment of a High Commissioner for India,] the Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, make any contract for the purposes of this Act.

(2) Any contract so made may be expressed to be made by the Secretary of State in Council.

(3) Any contract so made which, if it were made between private persons, would be by law required to be under seal, may be made, varied or discharged under the hands and seal of two members of the Council of India.

(4) Any contract so made which, if it were made between private persons, would be by law required to be signed by the party to be charged therewith, may be made, varied or discharged under the hands of two members of the Council of India.

(5) Provided that any contract for or relating to the manufacture, sale, purchase or supply of goods, or for or relating to affreightment or the carriage of goods, or to insurance, may, subject to such rules and restrictions as the Secretary of State in Council prescribes, be made and signed on behalf of the Secretary of State in Council by any person upon the permanent establishment of the Secretary of State in Council who is duly empowered by the Secretary of State in Council in this behalf. Contract so made and signed shall be as valid and effectual as if made as prescribed by the foregoing Provi-

1. These words were inserted by Sec. I of the Govt. of India (Amendment) Act, 1916 (6 & 7 Geo. 5, ch. 37) 2. This word was substituted for the word 'three' by *ibid.* 3. These words were inserted by Part II of Sec. II of the Government of India Act, 1919 (3 and 10 Geo. 5, ch. 101.) 4. 38 Cal 754.

sions of this section. Particulars of all contracts so made and signed shall be laid before the Secretary of State in Council in such manner and form and within such times as the Secretary of State in Council prescribes.

(6) The benefit and liability of every contract made in pursuance of this section shall pass to the Secretary of State in Council for the time being.

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[29 A. High Commissioner for India: His Majesty may by Order in Council make provision for the appointment of a High Commissioner for India in the United Kingdom, and for the pay, pension, powers, duties, and conditions of employment of the High Commissioner and of his assistants; and the Order may further provide for delegating to the High Commissioner any of the powers previously exercised by the Secretary of State in Council, whether under this Act or otherwise, in relation to making contracts, and may prescribe the conditions under which he shall act on behalf of the Governor-General in Council or any local government.]

High Commissioner; his duties, | Recommendations of the Statutory powers to seal and to account...73, 74 | Commission...74

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30. Power to execute assurances, &c., in India: (1) The Governor-General in Council and any local government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real ²[or personal] estate by way of mortgage, ³[or otherwise,] and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

³[(1a) A local government may on behalf and in the name of the Secretary of State in Council raise money on the security of revenues allocated to it under this Act, and make proper assurances for that purpose, and rules made under this Act may provide for the conditions under which this power shall be exercisable.]

⁴(2) Every assurance and contract made for the purposes of ⁵[sub-section

1. Section 29A was inserted by Part I, Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). 2. These words were inserted by Sch. I of the Government of India, (Amendment) A. t, 1916 (6 and 7 Geo. 5, ch. 37). 3. Sub-section (1a) was inserted by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). 4. 120 I. O 615 A. I. R. 1930 Lah. 364. 5. These words and figure were substituted for the words "this section" by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101).

(1) of this section] shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being.

(3) All property acquired in pursuance of this section shall vest in His Majesty for the purposes of the Government of India.

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31. Power to dispose of escheated property, &c.: The Governor-General in Council, and any other person authorised by any Act passed in that behalf by the ¹[Indian legislature] may make any grant or disposition of any property in British India accruing to His Majesty by forfeiture, escheat or lapse, or by devolution as *bona vacantia*, to or in favour of any relative or connection of the person from whom the property has accrued, or to or in favour of any other person.

32. Rights and liabilities of Secretary of State in Council: (1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed.

(3) ²The property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company if the Government of India Act, 1858, and this Act had not been passed.

(4) Neither the Secretary of State nor any member of the Council of India shall be personally liable in respect of any assurance or contract made by or on behalf of the Secretary of State in Council, or any other liability incurred by the Secretary of State or the Secretary of State in Council in his or their official capacity, nor in respect of any contract, covenant or engagement of the East India Company; nor shall any person executing any assurance or contract on behalf of the Secretary of State in Council be personally liable in respect thereof; but all such liabilities, and all costs and damages in respect thereof, shall be borne by the revenues of India.

Rights and liabilities of the Secretary of State in Council ..73

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1. These words were substituted for the words 'Governor-General in Legislative Council' by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. 37 Mad. 55. See also 54 Cal. 969 (1020-22.) 3. 11 1, C. 58.

PART IV

THE GOVERNOR-GENERAL IN COUNCIL

GENERAL POWERS AND DUTIES OF GOVERNOR-GENERAL
IN COUNCIL

33 Powers and control of Governor-General in Council: ¹[Subject to the provisions of this Act and rules made thereunder,] the superintendence, direction and control of the civil and military government of India is vested in the Governor-General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State.

²[Provided that His Majesty may by Order in Council transfer to and vest in such person or authority as may be specified in the Order, the superintendence, direction or control of the military government of Aden; and any such Order may contain such supplementary provisions as may be necessary for giving effect thereto and may be varied or revoked by any subsequent Order in Council made in like manner.]

(2) Any Order in Council which may be made in pursuance of the powers conferred on His Majesty by this section shall be laid before both Houses of Parliament as soon as may be after it has been made, and if an address is presented to His Majesty by either House of Parliament within the next thirty days on which that House has sat after the Order in Council is laid before it, praying that such Order in Council may be annulled, His Majesty in Council may annul such order, and such Order shall thenceforth be void but without prejudice to the validity of anything previously done thereunder.

(3) In this section the expression 'Aden' includes any dependencies of Aden whereof the military government is under the superintendence, direction or control of the Governor-General in Council.]

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THE GOVERNOR-GENERAL

34. The Governor-General: The Governor-General of India is appointed by His Majesty by warrant under the Royal Sign Manual.

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His Statutory and other special	His duties and responsibilities...77

1. These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101) 2. This proviso and sub-section (2) and (3) were inserted by the Government of India (Aden) Act, 1929 (20 Geo 5, ch. 2).

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35. [Constitution of the Governor-General's Executive council.] Omitted by Part II of Sch. II, 9 and 10 Geo. 5, ch. 101.

36. Members of Council: (1) The ¹[*] members of the Governor-General's executive council shall be appointed by His Majesty by warrant under the Royal Sign Manual.

(2) The number of the ¹[*] members of the council shall be ²[such as His Majesty thinks fit to appoint.]

(3) Three at least of them must be persons who ³[****] have been for at least ten years in the service of the Crown in India, and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland, ⁴[or a pleader of a High Court] of not less than ⁵[ten] years' standing.

(4) If any ⁶[member of the Council (other than the Commander-in-Chief for the time being of His Majesty's forces in India)] is at the time of his appointment in the military service of the Crown, he shall not, during his continuance in office as such member, hold any military command or be employed in actual military duties.

⁷[(5) Provision may be made by rules under this Act as to the qualifications to be required in respect of the members of the Governor-General's executive council in any case where provision is not made by the foregoing provision of this section.]

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1. The word "ordinary" was omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo 5, ch. 101). 2. These words were substituted for the words "five, or if His Majesty thinks fit to appoint a sixth member, "six" by *ibid.* 3. The words "at the time of their appointment" were omitted by *ibid.* 4. These words were inserted by *ibid.* 5. This word was substituted for the word "five" by *ibid.* 6. These were substituted for the words "person appointed an ordinary member of the council" by *ibid.* 7. Sub-section (5) was inserted by *ibid.*

[37. Rank and precedence of Commander-in-Chief: If the Commander-in-Chief for the time being of his Majesty's forces in India is a member of the Governor-General's executive council he shall, subject to the provisions of this Act, have rank and precedence in the Council next after the Governor-General.]

38. Vice-president of Council: The Governor-General shall appoint a member of his executive council to be vice-president thereof.

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39. Meetings: (1) The Governor-General's executive council shall assemble at such places in India as the Governor-General in Council appoints.

(2) At any meeting of the council the Governor-General or other person presiding and ³[one member of the council (other than the Commander-in-Chief) may exercise all the functions of the Governor-General in Council.

40. Business of Governor-General in Council: (1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed by a secretary to the Government of India, or otherwise, as the Governor-General in Council may direct ⁴[and when so signed shall not be called into question in any legal proceedings on the ground that they were not duly made by the Governor General in Council.]

(2) The Governor-General may make rules and orders for the more convenient transaction of business in his executive council, and every order made, or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the Governor-General in Council.

Various Departments . 82

41. Procedure in case of difference of opinion: (1) If any difference of opinion arises on any question brought before a meeting of the Governor-General's executive council, the Governor-General in Council shall be bound by the opinion and decision of the majority of those present, and, if they are equally divided, the Governor-General or other person presiding shall have a second or casting vote.

(2) Provided that whenever any measure is proposed before the Governor-General in Council whereby the safety, tranquility or interests of British India, or of any part thereof, are or may be, in the judgment of the Governor-General essentially affected, and he is of opinion either that the measure proposed ought to be adopted and carried into execution, or that it ought to be suspended or rejected, and the majority present at a meeting of the council dissent from that opinion, the Governor-General may, on his own authority and responsibility, adopt, suspend or reject the measure, in whole or in part.

1. Section 37 was substituted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo 5, ch. 101). 2. These words were substituted for the words "one ordinary member of the Council" by *ibid.* 3. These words were inserted by *ibid.*

(3) In every such case any two members of the dissentient majority may require that the adoption, suspension or rejection of the measure, and the fact of their dissent be reported to the Secretary of State, and the report shall be accompanied by copies of any minutes which the members of the council have recorded on the subject.

(4) Nothing in this section shall empower the Governor-General to do anything which he could not lawfully have done with the concurrence of his council.

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42. Provision for absence of Governor-General from meetings of Council: If the Governor-General is obliged to absent himself from any meeting of the council, by indisposition or any other cause, [* * *] the vice-president, or, if he is absent, the senior [membr (other than the Commander-in-Chief)] present at the meeting, shall preside thereat, with the like powers as the Governor-General would have had if present :

Provided that the Governor-General is at the time resident at the place where the meeting is assembled, and is not prevented by indisposition from signing any act of council made at the meeting, the act shall require his signature ; but, if he declines or refuses to sign it, the like provisions shall have effect as in cases where the Governor-General, when present, dissents from the majority at a meeting of the council.

43. Powers of Governor-General in absence from council : (1) Whenever the Governor-General in Council declares that it is expedient that the Governor-General should visit any part of India unaccompanied by his executive council, the Governor-General in council may, by order, authorise the Governor General alone to exercise, in his discretion, all or any of the powers which might be exercised by the Governor-General in Council at meetings of the Council.

(2) The Governor-General during absence from his executive council may, if he thinks it necessary, issue, on his own authority and responsibility, any order, which might have been issued by the Governor-General in council, to any local government, or to any officers or servants of the Crown acting under the authority of any local government without previously communicating the order to the local government ; and any such order shall have the same force as if made by the Governor-General in Council ; but a copy of the order shall be sent forthwith to the Secretary of State and to the local government, with the reasons for making the order.

(3) The Secretary of State in Council may by order suspend until further order all or any of the powers of the Governor-General under the last foregoing sub-section ; and those powers shall accordingly be suspended as from the time of the receipt by the Governor-General of the order of the Secretary of State in Council.

1. The words "and signifies his intended absence to the council" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101) 2. These words were substituted for the words "ordinary member" by Part II of Sch. II of *ibid.*

143A. Appointment of council secretaries: (1) The Governor-General may at his discretion appoint from among the members of the Legislative Assembly, council secretaries who shall hold office during his pleasure and discharge such duties in assisting the members of his executive council as he may assign them.

(2) There shall be paid to council secretaries so appointed such salary as may be provided by the Indian legislature.

(3) A council secretary shall cease to hold office if he ceases for more than six months to be a member of the Legislative Assembly.

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WAR AND TREATIES

44. Restriction on power of Governor-General in Council to make war or treaty: (1) The Governor-General in Council may not, without the express order of the Secretary of State in Council, in any case (except where hostilities have been actually commenced, or preparation for the commencement of hostilities have been actually made against the British Government in India or against any prince or state dependent thereon, or against any prince or state whose territories His Majesty is bound by any subsisting treaty to defend or guarantee), either declare war or commence hostilities or enter into any treaty for making war against any prince or state in India, or enter into any treaty for guaranteeing the possessions of any such prince or state.

(2) In any such excepted case the Governor-General in Council may not declare war, or commence hostilities, or enter into any treaty for making war, against any other prince or state than such as is actually committing hostilities or making preparations as aforesaid, and may not make any treaty for guaranteeing the possession of any prince or state except on the consideration of that prince or state actually engaging to assist His Majesty against such hostilities commenced or preparations made as aforesaid.

(3) When the Governor-General in Council commences any hostilities or makes any treaty, he shall forthwith communicate the same, with the reasons therefor, to the Secretary of State.

144A. Any naval forces and vessels which may from time to time be raised and provided by the Governor-General in Council shall be employed for the purposes of the Government of India alone, except that if the Governor-General declares that a state of emergency exists which justifies such action, the Governor-General in Council may place at the disposal of the Admiralty all or any of such forces and vessels, and thereupon it shall be lawful for the Admiralty to accept such offer.

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1. Section 143A was introduced by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 10) 2. This section was inserted by the Government of India Act (Indian Navy) Act, 1927 (17 & 18 Geo. 5, ch. 8)

PART V

LOCAL GOVERNMENT

GENERAL

45. Relation of local governments to Governor-General in Council : (1) ¹[Subject to the provisions of this Act and rules made thereunder] every local government shall obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of its proceedings and of all matters which ought, in its opinion, to be reported to him, or as to which he requires information, and under his superintendence, direction and control in all matters relating to the government of its province

²(2) [No local government may make or issue any order for commencing hostilities or levying war, or negotiate or conclude any treaty of peace or other treaty with any Indian prince or state (except in cases of sudden emergency or imminent danger when it appears dangerous to postpone such hostilities or treaty), unless in pursuance of express orders from the Governor-General in Council or from the Secretary of State; and every such treaty shall, if possible contain a clause subjecting the same to the ratification or rejection of the Governor-General in Council. If any governor, lieutenant-governor or chief commissioner, or any member of a governor's or lieutenant-governor's executive council, wilfully disobeys any order received from the Governor-General in Council under this sub-section, he may be suspended or removed and sent to England by the Governor-General in Council, and shall be subject to such pains and penalties as are provided by law in that behalf.]

(3) The authority of a local government is not suspended by the presence in its province of the Governor-General.

See under the following section.

³**[45A. Classification of central and provincial subjects :** (1) Provision may be made by rules under this Act :

(a) for the classification of relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature ;

(b) for the devolution of authority in respect of Provincial subjects to local government, and for the allocation of revenues or other moneys to those governments ;

(c) for the use under the authority of the Governor-General in Council or the agency of local governments in relation to central subjects, in so far as such agency may be found convenient and for determining the financial conditions of such agency: and

¹ These words were inserted by Part II of Sch. 11 of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 107) 2. Sub-section (2) should be read as if re-enacted by 20 Geo. 5, ch. 2; 3. Section 45A was inserted by Part I of Sch. 11 of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

(d) for the transfer from among the provincial subjects of subjects (in this Act referred to as "transferred subjects") to the administration of the governor acting with ministers appointed under this Act, and for the allocation of revenues or moneys for the purpose of such administration.

(2) Without prejudice to the generality of the foregoing powers, rules made for the above mentioned purposes may—

- i) regulate the extent and conditions of such devolution, allocation, and transfer ;
- (ii) provide for fixing the contributions payable by local governments to the Governor-General in Council, and making such contributions a first charge on allocated revenues or moneys;
- (iii) provide for constituting a finance department in any province, and regulating the functions of that department;
- (iv) provide for regulating the exercise of the authority vested in the local government of a province over members of the public services therein;
- (v) provide for the settlement of doubts arising as to whether any matter does or does not relate to a provincial subject or a transferred subject, and for the treatment of matters which affect both a transferred subject and a subject which is not transferred; and
- (vi) make such consequential and supplemental provisions as appear necessary or expedient;

Provided that without prejudice to any general power of revoking or altering rules under this Act, the rules shall not authorise the revocation or suspension of the transfer of any subject except with the sanction of the Secretary of State in Council.

(3) The powers of superintendence, direction, and control over local governments vested in the Governor-General in Council under this Act shall, in relation to transferred subjects, be exercised only for such purposes as may be specified in rules made under this Act, but the Governor-General in Council shall be the sole judge as to whether the purpose of the exercise of such powers in any particular case comes within the purposes so specified.

(4) The expressions "central subjects" and "provincial subjects" as used in this Act mean subjects so classified under the rules.

Provincial subjects, other than transferred subjects, are in this Act referred to as "reserved subjects."]

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Note: See also notes under sections 33, 34 & 36

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46. (1) Local government in governors' provinces: [(1) The presidencies of Fort William in Bengal, Fort St. George, and Bombay, and the provinces known as the United Provinces, the Punjab, Bihar and Orrisa, the Central Provinces, and Assam, shall each be governed, in relation to reserved subjects, by a governor in council, and in relation to transferred subjects (save as otherwise provided by this Act) by the governor acting with ministers appointed under this Act.

The said presidencies and provinces are in this Act referred to as "governor's provinces" and the two first named presidencies are in this Act referred to as the presidencies of Bengal and Madras.]

(2) The governor of the said presidencies are appointed by His Majesty by warrant under the Royal Sign Manual, and the governors of the said provinces shall be so appointed after consultation with the Governor-General.]

(3) The Secretary of State may if he thinks fit, by order revoke or suspend, for such period as he may direct, the appointment of a council for any or all of ⁴ [the governors' provinces]; and while any such order is in force the governor of the ⁵ [province] to which the order refers shall have all the powers of the Governor thereof in Council.

See under section 47.

47. Members of governors' executive council: (1) The members of a governor's executive council shall be appointed by His Majesty by warrant under the Royal Sign Manual, and shall be of such number, not exceeding four as the Secretary of State in Council directs.

(2) One at least of them must be a person who at the time of his appointment has been for at least twelve years in the service of the Crown in India.

(3) Provision may be made by rules under this Act as to the qualifications to be required in respect of members of the executive council of the governor of a province in any case where such provision is not made by the foregoing provisions of this section.

1. (1926) M. W. N. 842; A. I. R. 1930 Mad. 806. 2. Sub-section 1 of section 46 was substituted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). The province of Burma was constituted a governor's province from January, 1923. 3. This sub-section was substituted by Part II of *ibid.* 4. These words were substituted for the word 'these presidencies' by *ibid.* 5. This word was substituted for the word 'presidency' by *ibid.* 6. These words were substituted for the words 'Two at least of them must be persons who at the time of their appointment have been' by *ibid.* 7. This sub-section was substituted by *ibid.*

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48. Vice-president of council: Every governor of a [province] shall appoint a member of his executive council to be vice-president thereof.

²[**49. Business of governor in council and governor with ministers:** (1) All orders and other proceedings of the government of a governor's province shall be expressed to be made by the government of the province, and shall be authenticated as the governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the government of the province.

(2) The Governor may make rules and orders for the more convenient transaction of business in his executive council and with his ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the government of the province.

The governor may also make rules and orders for regulating the relations between his executive council and his ministers for the purpose of the transaction of the business of the local government.

Provided that any rules or orders made for the purposes specified in this section which are repugnant to the provisions of any other rules made under this Act shall, to the extent of that repugnancy, but not otherwise, be void.]

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50. Procedure in case of difference of opinion in executive council: (1) If any difference of opinion arises on any question brought before a meeting of a governor's executive council, the governor in council shall be bound by the opinion and decision of the majority of those present, and if they are equally divided the governor or other person presiding shall have a second or casting vote.

(2) Provided that, whenever any measure is proposed before a governor in council whereby the safety, tranquility or interests of his ³[province], or of any part thereof, are or may be, in the judgment of the governor, essentially affected, and he is of opinion either that the measure proposed ought to be adopted and carried into execution, or that it ought to be suspended or rejected,

1. This word was substituted for the word "Presidency" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. Section 49 was substituted by Part I of *ibid.* 42 Mad. 885; 53 M. L. J. 633; 49 Mad. 49. 3. This word was substituted for the word "Presidency" by *ibid.*

and the majority present at a meeting of the council dissent from that opinion, the governor may on his own authority and responsibility, by order in writing adopt, suspend or reject the measure, in whole or in part.

(3) In every such case the governor and the members of the council present at the meeting shall mutually exchange written communications (to be recorded at large in their secret proceedings) stating the grounds of their respective opinions, and the order of the governor shall be signed by the governor and by those members.

(4) Nothing in this section shall empower a governor to do anything which he could not lawfully have done with the concurrence of his council.

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51. Provision for absence of governor from meetings of council: If a governor is obliged to absent himself from any meeting of his executive council, by indisposition or any other cause, ¹[**] the vice-president, or, if he is absent, the senior ²['] member present at the meeting, shall preside thereat, with the like powers as the governor would have had if present :

Provided that if the governor is at the time resident at the place where the meeting is assembled, and is not prevented by indisposition from signing any act of council made at the meeting, the act shall require his signature ; but, if he declines or refuses to sign it, the like provision shall have effect as in cases where the governor, when present, dissents from the majority at a meeting of the council.

³52. Appointment of ministers and council Secretaries: (1) The governor of a governor's province may, by notification, appoint ministers, not being members of his executive council or other officials, to administer transferred subjects, and any minister so appointed shall hold office during his pleasure

There may be paid to any minister so appointed in any province the same salary as is payable to a member of the executive council in that province unless a smaller salary is provided by vote of the legislative council of the province.

(2) No minister shall hold office for a longer period than six months, unless he is or becomes an elected member of the legislature.

(3) In relation to transferred subjects, the governor shall be guided by the advice of his ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice :

Provided that rules may be made under this Act for the temporary administration of a transferred subject where, in cases of emergency, owing to a vacancy, there is no minister in charge of the subject, by such authority and in such manner as may be prescribed by the rules.

1. The words "and signifies his intended absence to the council" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. The word "civil" was omitted by *ibid.* 3 Section 52 was substituted by Part II of *ibid.*

(4) The Governor of a Governor's province may at his direction appoint from among the non-official members of the local legislature, council secretaries, who shall hold office during his pleasure; and discharge such duties in assisting members of the executive council and ministers as he may assign to them.

There shall be paid to council secretaries so appointed such salary as may be provided by vote of the legislative council.

A council secretary shall cease to hold office if he ceases for more than six months to be a member of the legislative council.]

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[52A. Constitution of new provinces, etc , and provision as to backward tracts : (1) The Governor-General in Council may, after obtaining an expression of opinion from the local government and the legislature affected, by notification, with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute a new governor's province, or place part of a governor's province under the administration of a deputy-governor to be appointed by the Governor-General, and may in such case apply, with such modifications as appear necessary or desirable, all or any of the provisions of this Act relating to governor's provinces, or provinces under a lieutenant-governor or chief commissioner, to any such province or part of a province.

(2) The Governor-General in Council may declare any territory in British India to be a "backward tract," and may, by notification, with such

1. Section 52A and 52B were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). The province of Burma was constituted a governor's province from effect from January 2, 1923 by notification No. 225, dated 7th October, 1921 and notification No. 1192, dated 2nd January, 1923. Similarly, N. W. Frontier was constituted a Governor's province with effect from 1922

sanction as aforesaid, direct that this Act shall apply to that territory subject to such exceptions and modifications as may be prescribed in the notification.

Where the Governor-General in Council has, by notification, directed as aforesaid, he may, by the same or subsequent notification, direct that any Act of the Indian legislature shall not apply to the territory in question or any part thereof, or shall apply to the territory or any part thereof subject to such exceptions or modifications as the Governor-General thinks fit, or may authorise the governor in council to give similar directions as respects any Act of the local legislature.]

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[52B. Saving : (1) The validity of any order made or action taken after the commencement of the Government of India Act, 1919, by the Governor-General in Council or by a local government which would have been within the powers of the Governor-General in Council or of such local government which if that Act had not been passed, shall not be open to question in any legal proceedings on the ground that by reason of any provision of that Act or this Act, or of any rule made by virtue of any such provision, such order or action has ceased to be within the powers of the Governor-General in Council or of the government concerned.

(2) The validity of any order made or action taken by a governor in council, or by a governor acting with his minister shall not be open to question in any legal proceedings on the ground that such order or action relates or does not relate to a transferred subject of which the minister is not in charge].

LIEUTENANT-GOVERNORSHIPS AND OTHER PROVINCES

53. Lieutenant-Governorship : (1) [The province of] Burma, is, subject to the provisions of this Act, governed by a lieutenant-governor [****].

(2) The Governor-General in Council may, by notification, with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute a new province under a Lieutenant-Governor.

54. Appointment, etc , of lieutenant-governors: (1) A lieutenant-governor is appointed by the Governor-General with the approval of His Majesty.

(2) A lieutenant-governor must have been, at the time of his appointment at least ten years in the service of the Crown in India.

[(3) * * * *]

1. See footnote on page 239 supra. 2. These words were substituted for the words " Each of the following provinces, namely, those known as Bihar and Orissa, the United Provinces of Agra and Oudh, the Punjab and " by Part II of Sch II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 3. The words " with or without an executive council " were omitted by *ibid.* 4. Sub-section (3) was omitted by Part III of *ibid.*

55. Power to create executive councils of lieutenant-governors: (1) The Governor-General in Council, with the approval of the Secretary of State in Council, may, by notification, create a council in any province under a lieutenant-governor, for the purpose of assisting the lieutenant-governor in the executive government of the province, and by such notification—

- (a) make provision for determining what shall be the number (not exceeding four) and qualifications of the members of the Council; and
- (b) make provision for the appointment of temporary or acting members of the council during the absence of any member from illness or otherwise,¹[and for supplying a vacancy until it is permanently filled] and for the procedure to be adopted in case of a difference of opinion between a lieutenant-governor and his council, and in the case of equality of votes, and in the case of a lieutenant-governor being obliged to absent himself from his council by indisposition or any other cause:

Provided that, before any such notification is published, a draft thereof shall be laid before each House of Parliament for not less than sixty days during the session of Parliament, and if, before the expiration of that time, an address is presented to His Majesty by either House of Parliament against the draft or any part thereof, no further proceedings shall be taken thereon, without prejudice to the making of any new draft.

(2) Every notification under this section shall be laid before both Houses of Parliament as soon as may be after it is made.

(3) Every member of a lieutenant-governor's executive council shall be appointed by the Governor-General, with the approval of His Majesty.

56. Vice-president of lieutenant-governor's council: A lieutenant-governor who has an executive council shall appoint a member of the council to be vice-president thereof, and that vice-president shall preside at meetings of the council in the absence of the lieutenant-governor.

57. Business of lieutenant-governor in council: A lieutenant-governor who has an executive council may, with the consent of the Governor-General in Council, make rules and orders for more convenient transaction of business in the council, and every order made, or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the lieutenant-governor in council. ²[An order made as aforesaid shall not be called into question in any legal proceedings on the ground that it was not duly made by the lieutenant governor in council.]

1. These words were inserted by Part III of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch 101). 2 These words were inserted by Part II of *ibid.*

58. ¹Chief Commissioners : Each of the following provinces, namely, those known as ²[... ..] the North West Frontier Province, British Baluchistan; Delhi, Ajmer-Merwara, Coorg, and the Andaman and Nicobar Islands, is subject to the provisions of this Act, administered by a Chief Commissioner.

59. Power to place territory under authority of Governor-General in Council : The Governor-General in Council may, with the approval of the Secretary of State and by notification, take any part of British India under the immediate authority and management of the Governor-General in Council, and thereupon give all necessary orders and directions respecting the administration of that part, by placing it under a Chief Commissioner or by otherwise providing for its administration.

BOUNDARIES

60. ¹Power to declare and alter boundaries of provinces : The Governor-General in Council may, by notification, appoint or alter boundaries of any of the provinces into which British India is for the time being divided, and distribute the territories of British India among the several provinces thereof in such manner as may seem expedient, subject to these qualifications, namely :

- (1) an entire district may not be transferred from one province to another without the previous sanction of the Crown, signified by the Secretary of State in Council; and
- (2) any notification under this section may be disallowed by the Secretary of State in Council.

61. Saving as to laws : An alteration in pursuance of the foregoing provisions of the mode of administration of any part of British India, or of the boundaries of any part of British India, shall not affect the law for the time being in force in that part.

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62. Power to extend boundaries of presidency-towns : The Governor of Bengal in Council, the Governor of Madras in Council and the Governor of Bombay in Council may, with the approval of the Secretary of State in Council, and by notification, extend the limits of the towns of Calcutta, Madras and Bombay, respectively; and any Act of Parliament, letters-patent, charter, law or usage conferring jurisdiction, power or authority within the limits of those towns respectively shall have effect within the limits as so extended.

1. 48 C. L. J. 528. 2. The words "Assam, the Central Provinces" were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). 3. 5 Pat. L. J 41.

PART VI
INDIAN LEGISLATION
THE INDIAN LEGISLATURE

[63. Indian Legislature: Subject to the provisions of this Act, the Indian legislature shall consist of Governor-General and two chambers, namely, the Council of State and the Legislative Assembly.

Except as otherwise provided by or under this Act, a Bill shall not be deemed to have been passed by the Indian legislature unless it has been agreed to by both chambers, either without amendment or with such amendments only as may be agreed to by both chambers.]

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[63A. Council of State: (1) The Council of State shall consist of not more than sixty members nominated or elected in accordance with rules made under this Act, of whom not more than twenty shall be official members.

(2) The Governor-General shall have power to appoint from among the members of the Council of State, a president and other persons to preside in such circumstances as he may direct.

(5) The Governor-General shall have the right of addressing the Council of State, and may for that purpose require the attendance of its members.

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[63B. Legislative Assembly: (1) The Legislative Assembly shall consist of members nominated or elected in accordance with rules made under this Act.

(2) The total number of members of the Legislative Assembly shall be one hundred and forty. The number of non-elected members shall be forty, of whom twenty-six shall be official members. The number of elected members shall be one hundred.

Provided that rules made under this Act may provide for increasing the number of members of the Legislative Assembly as fixed by this section, and may vary the proportion which the classes of members bear one to another, so, however, that at least five-sevenths of the members of the Legislative Assembly shall be elected members, and at least one-third of the other members shall be non-official members

The Governor-General shall have the right of addressing the Legislative Assembly, and may for that purpose require the attendance of its members.]

1. Sections 63, 63A, 63B, 63C, 63D, 63E, and 64 were substituted for sections 63 and 64 by part I of Sch II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101),

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[63C. President of Legislative Assembly : (1) There shall be a president of the Legislative Assembly, who shall, until the expiration of four years from the first meeting thereof, be a person appointed by the Governor-General, and shall thereafter be a member of the Assembly elected by the Assembly and approved by the Governor-General.

Provided that, if at the expiration of such period of four years the Assembly is in session, the president then in office shall continue in office until the end of the current session, and the first election of a president shall take place at the commencement of the ensuing session.

(2) There shall be a deputy-president of the Legislative Assembly, who shall preside at meetings of the Assembly in the absence of the president, and who shall be a member of the Assembly elected by the Assembly and approved by the Governor-General.

(3) The appointed president shall hold office until the date of the election of a president under this section, but he may resign his office by writing under his hand addressed to the Governor-General, or may be removed from office by order of the Governor-General, and any vacancy occurring before the expiration of his term of office shall be filled by a similar appointment for the remainder of such term.

(4) An elected president and a deputy-president shall cease to hold office if they cease to be members of the Assembly. They may resign office by writing under their hand addressed to the Governor-General, and may be removed from office by a vote of the Assembly with the concurrence of the Governor-General.

(5) A president and deputy-president shall receive such salaries as may be determined, in the case of an appointed president by the Governor-General, and in the case of an elected president and a deputy-president by Act of the Indian legislature.

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[63D. Duration and sessions of Legislative Assembly and Council of State: (1) Every Council of State shall continue for five years, and every Legislative Assembly for three years from its first meeting:

Provided that—

- (a) either chamber of the legislature may be sooner dissolved by the Governor-General; and
- (b) any such period may be extended by the Governor-General if in special circumstances he so thinks fit; and
- (c) after the dissolution of either chamber the Governor-General shall appoint a date not more than six months, or with the sanction of the Secretary of State not more than nine months, after the date of dissolution for the next session of that chamber.

(2) The Governor-General may appoint such times and places for holding the sessions of either chamber of the Indian legislature as he thinks fit and may also from time to time, by notification or otherwise, prorogue such sessions.

(3) Any meeting of either chamber of the Indian legislature may be adjourned by the person presiding.

(4) All questions in either chamber shall be determined by a majority of votes of members present other than the presiding member who shall, however, have and exercise a casting vote in the case of an equality of votes.

(5) The powers of either chamber of the Indian legislature may be exercised notwithstanding any vacancy in the chamber.]

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[63E. Membership of both chambers : (1) An official shall not be qualified for election as a member of either chamber of the Indian legislature, and if any non official member of either chamber accepts office in the service of the Crown of India, his seat in that chamber shall become vacant.

(2) If an elected member of either chamber of the Indian legislature becomes a member of the other chamber, his seat in such first mentioned chamber shall thereupon become vacant.

(3) If any person is elected a member of both chambers of the Indian legislature, he shall, before he takes his seat in either chamber signify in

writing the chamber of which he desires to be a member, and thereupon his seat in the other chamber shall become vacant.

(4) Every member of the Governor-General's Executive Council shall be nominated as a member of the Indian legislature, and shall have the right of attending in and addressing the other chamber, but shall not be a member of both chambers]

[64. Supplementary provisions as to composition of Legislative Assembly and Council of State: Subject to the Provisions of this Act, provision may be made by rules under this Act as to—

- (a) the term of office of nominated members of the Council of State and Legislative Assembly, and the manner of filling casual vacancies occurring by reason of absence of members from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted or otherwise; and
- (b) the conditions under which and the manner in which persons may be nominated as members of the Council of State or the Legislative Assembly; and
- (c) the qualification of electors, the constitution of constituencies, and the method of election for the Council of State and the Legislative Assembly (including the number of members to be elected by communal and other electorates) and any matters incidental or ancillary thereto; and
- (d) the qualifications for being or for being nominated or elected as members of the Council of State or the Legislative Assembly; and
- (e) the final decision of doubts or disputes as to the validity of an election and
- (f) the manner in which the rules are to be carried into effect.

(2) Subject to any such rules, any person who is a ruler or subject of any state in India may be nominated as a member of the Council of State or the Legislative Assembly.]

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65. ¹Powers of Indian Legislature: (1) The ²[Indian legislature] has power to make laws –

(a) for all persons, for all courts, and for all places and things, within British India; and

1. 49 I. A. 48, (=40 Cal. 391), 45 Bom. 1161 (=23 Bom. L. R. 492). 2. These words were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo 5, ch. 101)

- (b) for all subjects of His Majesty and servants of the Crown within other parts of India ; and
- (c) for all native Indian subjects of His Majesty, without and beyond as well as within British India ; and
- (d) for the government of officers, soldiers, ¹[air-men] and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act ¹[or the Air Force Act]; and
- (e) for all persons employed or serving in or belonging to ²[any naval forces raised by the Governor-General in Council, wherever they are serving, in so far as they are not subject to the Naval Discipline Act] and
- (f) for repealing or altering any laws which for the time being are in force in any part of British India or apply to persons for whom the ³[Indian legislature] has power to make laws

(2) Provided that the ¹[Indian legislature] has not, unless expressly so authorised by Act of Parliament, power to make any law repealing or affecting—

- (i) any Act of Parliament, passed after the year one thousand eight hundred and sixty and extending to British India including the Army Act, ¹[the Air Force Act] and any Act amending the same; or
- (ii) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the government of India ; and has not power to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India. ⁴

(3) The ¹[Indian legislature] has not power without the previous approval of the Secretary of State in Council, to make any law empowering any court, other than a high court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any high court.

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1. These words were inserted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2 These words were substituted for the words "The Royal Indian Marine Services" by the Government of India (Indian Navy) Act, 1927 (17 and 18 Geo. 5, ch. 8). 3. These words were substituted for the words "Governor-General" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 4. 1 Lab. 326 (47 I. A. 128), 39 Mad. 1085

[66. Laws for the Royal Indian Marine Service: Subject to the provisions of this Act, provision may be made by the Indian Legislature for the application to the naval forces raised by the Governor-General in Council of the Naval Discipline Act, and that Act, if so applied, shall have effect as if references therein to His Majesty's Navy and His Majesty's ships included the forces and ships raised and provided by the Governor-General in Council, subject, however—

- (a) in the application of the said Act to the forces and ships raised and provided by the Governor-General in Council, and the trial by court-martial of officers and men belonging to those forces, to such modifications and adaptations (if any) as may be made by the Indian Legislature to adapt the Act, to the circumstances of India, including such adaptations as may be so made for the purpose of authorising or requiring anything, which under the said Act is to be done by or to the Admiralty or Secretary of the Admiralty, to be done by or to the Governor-General in Council or by or to such person as may be vested with the authority by the Governor-General in Council; and
- (b) in the application of the said Act to the forces and ships of His Majesty's Navy not raised and provided by the Governor-General in Council, to such modifications as may be made by His Majesty in Council for the purpose of regulating the relations of the last mentioned forces and ships to the forces and ships raised and provided by the Governor-General in Council :

Provided that, where any forces and ships so raised and provided by the Governor-General in Council have been placed at the disposal of the Admiralty, the said Act shall apply without any such modifications or adaptations as aforesaid.]

67. Business and proceedings in Indian Legislature : (1) Provision may be made by rules under this Act for regulating the course of business and the preservation of order in the chambers of the Indian legislature and as to the persons to preside at the meeting of the Legislative Assembly in the absence of the president and the deputy-president ; and the rules may provide for the numbers required to constitute a quorum and for prohibiting or regulating the asking of questions on, and the discussion of, any subject specified in the rules.]

(2) It shall not be lawful, without the previous sanction of the Governor-General, to introduce at any meeting of [either chamber of the Indian legislature] any measure affecting—

- (a) the public debt or public revenues of India or imposing any charge on the revenues of India ; or

1. This new section was substituted for the original section by the Government of India (Indian Navy) Act 1927 (17 & 18 Geo. 5, ch. 8) 2. This sub-section was substituted by Part I of Sch. II of the Government of India Act, 1919 (9 to 10 Geo. 5, ch. 101.) 3. These words were substituted for the words "the Council" by Part II *ibid*.

- (b) the religion or religious rites and usages of any class of British subjects in India ; or
- (c) the discipline or maintenance of any part of His Majesty's military.
¹[naval, or air] forces ; or
- (d) the relations of the Government with foreign princes or states ;
²[or any measure—
- (i) regulating any provincial subject, or any part of a provincial subject, which has not been declared by rules under this Act to be subject to legislation by the Indian legislature ; or
- (ii) repealing or amending any Act of a Local legislature ; or
- (iii) repealing or amending any Act or Ordinance made by the Governor-General.]

³[(2a) Where in either chamber of the Indian legislature any Bill has been introduced, or is proposed to be introduced, or any amendment to a Bill is moved, or proposed to be moved, the Governor-General may certify that the Bill, or any clause of it, or the amendment, affects the safety or tranquility of British India, or any part thereof, and may direct that no proceedings, or that no further proceedings shall be taken by the chamber in relation to the Bill, clause, or amendment, and effect shall be given to such direction.]

⁴[(3) If any Bill which has been passed by one chamber is not within six months after the passage of the Bill by that chamber, passed by the other chamber either without amendments or with such amendments as may be agreed to by the two chambers, the Governor-General may in his discretion refer the matter for decision to a joint sitting of both chambers : Provided that standing orders made under this section may provide for meetings of members of both chambers appointed for the purpose, in order to discuss any difference of opinion which has arisen between the two chambers.

(4) Without prejudice to the powers of the Governor-General under section sixty-eight of this Act, the Governor-General may, where a Bill has been passed by both chambers of Indian legislature, return the Bill for reconsideration by either chamber.

(5) Rules made for the purpose of this section may contain such general and supplemental provisions as appear necessary for the purpose of giving full effect to this section.

(6) Standing orders may be made providing for the conduct of business and the procedure to be followed in either chamber of the Indian legislature

1. These words were substituted for the words " or naval " by Part III of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. These clauses were inserted by Part II; *ibid.* 3. Sub-section (2a) was inserted by *ibid.* 4. Sub-sections (3), (4), (5), (6) & (7) were substituted for sub-section (3) by Part I; *ibid.*

in so far as these matters are not provided for by rules made under this Act. The first standing orders shall be made by the Governor-General in Council, but may with the consent of the Governor-General be altered by the chamber to which they relate.

Any standing order made as aforesaid which is repugnant to the provisions of any rule made under this Act shall, to the extent of that repugnancy but not otherwise, be void.

(7) Subject to the rules and standing orders affecting the chamber there shall be freedom of speech in both chambers of the Indian legislature. No person shall be liable to any proceedings in any court by reason of his speech or vote in either chamber, or by reason of anything contained in any official report of the proceedings of either chamber.]

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¹[67A. Indian Budget:; (1) The estimated annual expenditure and revenue of the Governor-General in Council shall be laid in the form of a statement before both chambers of the Indian legislature in each year.

(2) No proposal for the appropriation of any revenue or money for any purpose shall be made except on the recommendation of the Governor-General.

(3) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to the following heads of expenditure shall not be submitted to the vote of the Legislative Assembly, nor shall they be open to discussion by either chamber at the time when the annual statement is under consideration, unless the Governor-General otherwise directs—

(i) interest and sinking fund charges on loans ; and

(ii) expenditure of which the amount is prescribed by or under any law and

²[(iii) Salaries and pensions payable to or to the dependents of

(a) persons appointed by or with the approval of His Majesty or by the Secretary of State in Council ;

1. Section 67A was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. These paragraphs were substituted for the original paragraphs by the Government of India (Civil Services) Act, 1925 (15 & 16 Geo. 5, ch. 83),

- (b) chief commissioners and judicial commissioners;
- (c) persons appointed before the first day of April 1924, by the Governor-General in Council or by a local government to services or posts classified by rules under this Act as superior services or posts and
- (iv) Sums payable to any person who is or has been in the civil service of the Crown in India under any order of the Secretary of State in Council, of the Governor-General in Council or of a Governor, made upon an appeal made to him in pursuance of rules made under this Act.]
- (v) expenditure classified by the order of the Governor-General in Council as—
 - (a) ecclesiastical;
 - (b) political;
 - (c) defence.

[For the purposes of this sub-section the expression "salaries and pensions" includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a pension in respect of his office.]

(4) If any question arises as to whether any proposed appropriation of revenue or moneys does or does not relate to the above heads, the decision of the Governor-General on the question shall be final.

(5) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to heads of expenditure not specified in the above heads shall be submitted to the vote of the Legislative Assembly in the form of demands for grants.

(6) The Legislative Assembly may assent or refuse its assent to any demand or may reduce the amount referred to in any demand by a reduction of the whole grant.

(7) The demands as voted by the Legislative Assembly, shall be submitted to the Governor-General in Council, who shall, if he declares that he is satisfied that any demand which has been refused by the Legislative Assembly is essential to the discharge of his responsibilities, act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, by the Legislative Assembly.

(8) Notwithstanding anything in this section the Governor-General shall have power, in cases of emergency, to authorise such expenditure as may, in his

1. This paragraph was inserted by the Government of India (Civil Services) Act, 1925 (15 & 16 Geo. 5, ch. 83.)

opinion, be necessary for the safety or tranquility of British India or any part thereof.]

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[**67B.** Provision for case of failure to pass legislation : (1) Where either chamber of the Indian Legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill the Governor General may certify that the passage of the Bill is essential for the safety, or interests of British India or any part thereof, and thereupon—

- (a) If the Bill has not already been passed by the other chamber, the Bill shall on signature by the Governor-General, notwithstanding that it has not been consented to by both chambers, forthwith become an Act of the Indian Legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian Legislature, or (as the case may be) in the form recommended by the Governor-General; and
- (b) If the Bill has not already been so passed, the Bill shall be laid before the other chamber, and, if consented to by that Chamber in the form recommended by the Governor-General, shall become an Act as aforesaid on the signification of the Governor-General's assent, or, if not so consented to, shall, on signature by the Governor-General, become an Act as aforesaid.

(2) Every such Act shall be expressed to be made by the Governor-General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the Indian legislature and duly assented to:

Provided that where in the opinion of the Governor-General a state of emergency exists which justifies such action, the Governor General may direct that any such Act shall come into operation forthwith, and thereupon the Act shall have such force and effect as aforesaid, to disallowance by His Majesty in Council.]

1. Section 67 B was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101.)

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68. Assent of Governor-General to Bills: (1) When ¹[a Bill] has been passed ²[by both chambers of the Indian legislature]; the Governor-General, ³[... ..], may declare that he assents to the ⁴[Bill], or that he withholds assent from the ⁴[Bill], or that he reserves the ⁴[Bill] for the signification of His Majesty's pleasure thereon.

(2) ⁵[A Bill passed by both chambers of the Indian legislature shall not become an Act] until the Governor-General has declared his assent thereto, or in the case of ⁶[a Bill] received for signification of His Majesty's pleasure, until His Majesty ⁷[in Council] has signified his assent ⁸[.. ..], and that assent has been notified by the Governor-General.

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69. Power of Crown to disallow Act: (1) When an Act of the ⁹[Indian legislature] has been assented to by the Governor-General, he shall send to the Secretary of State an authentic copy thereof and it shall be lawful for His Majesty ¹⁰[in Council] to signify ¹¹[... ..] his disallowance of any such Act.

(2) Where the disallowance of any such Act has been so signified, the Governor-General shall forthwith notify the disallowance, and thereupon the Act, as from the date of the notification, shall become void accordingly.

70. [Rules for conduct of legislative business]: Omitted by Part II of Sch. II of 9 & 10 Geo. 5, ch. 101.

REGULATIONS AND ORDINANCES

71. Power to make Regulations: (1) The local government of any part of British India to which this section for the time being applies may propose to the Governor-General in Council the draft of any regulation for the peace and good government of that part, with the reasons for proposing the regulation.

1. These words were substituted for the words "an Act" by Part II of Sch. II of the Government of India Act, (9 & 10 Geo. 5, ch. 101). 2. These words were inserted for the words "at a meeting of the Indian Legislative Council" by *ibid.* 3. The words "whether he was or was not present in Council at the passing thereof" were omitted by *ibid.* 4. This word was substituted for the word "Act" by *ibid.* 5. These words were substituted for the words "An Act of the Governor-General in Legislative Council has no validity" by *ibid.* 6. These words were substituted for the words "an Act" by *ibid.* 7. These words were inserted by *ibid.* 8. The words "to the Governor-General through the Secretary of State in Council" were omitted by *ibid.* 9. These words were substituted for the words "Governor-General in Legislative Council" by *ibid.* 10. These words were substituted by *ibid.* 11. The words "through the Secretary of State in Council" were omitted by *ibid.*

(2) Thereupon the Governor-General in Council may take any such draft and reasons into consideration; and when any such draft has been approved by the Governor-General in Council and assented to by the Governor-General, it shall be published in the Gazette of India and in the local official gazette, if any, and shall thereupon have the like force of law and be subject to the like disallowance as if it were an Act of the ¹[Indian legislature].

(3) The Governor-General shall send to the Secretary of State in Council an authentic copy of every regulation to which he has assented under this section.

²[(3A) A regulation made under this section for any territory shall not be invalid by reason only that it confers or delegates power to confer on courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction or function, or that it confers or delegates power to confer appellate jurisdiction or functions on courts or administrative authorities sitting or acting outside the territory.]

(4) The Secretary of State may, by resolution in the council, apply this section to any part of British India as from a date to be fixed in the resolution and withdraw the application of this section from any part to which it has been applied.

72. ³ Power to make ordinance in case of emergency : The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation have the like force of law as an Act passed by the ⁴[Indian legislature] but the power of making Ordinance under this section is subject to the like restrictions as the power of the ⁴[Indian legislature] to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the ⁴[Indian legislature] and may be controlled or superseded by any such Act.

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1. These words were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. This sub-section was inserted by section 2 (1) of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, ch. 37). 3. 41 A. (=4 Cal. 172), A. I. R. 1929 P. C. 23, A. I. R. 1930 Lah. 781; 31 Bom. L.R. Page No. 33 Bom. L.R. 950. 4. These words were substituted for the "words Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5 ch. 101.)

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LOCAL LEGISLATURES

(A) GOVERNORS' PROVINCES

[72A. Composition of Governors' legislative council : (1) There shall be a legislative council in every governor's province which shall consist of the members of the executive council and of the members nominated or elected as provided by this Act.

The governor shall not be a member of the legislative council, but shall have the right of addressing the council, and may for that purpose require the attendance of its members.

(2) The number of members of the governor's legislative council shall be in accordance with the table set out in the First Schedule to this Act: and of the members of each council not more than twenty per cent. shall be official members, and at least seventy per cent. shall be elected members:

Provided that—

- (a) subject to the maintenance of the above proportions, rules under this Act may provide for increasing the number of members of any council, as specified in that schedule ; and
- (b) the governor may, for the purpose of any Bill introduced or proposed to be introduced in his legislative council, nominate, in the case of Assam one person, and in the case of other provinces not more than two persons, having special knowledge or experience of the subject-matter of the Bill, and those persons shall, in relation to the Bill, have for the period for which they are nominated all the rights of members of the council and shall be in addition to the numbers above referred to ; and
- (c) members nominated to the legislative council of the Central Provinces by the governor as the result of elections held in the Assigned Districts of Berar shall be deemed to be elected members of the legislative council of the Central Provinces.

(3) The powers of a governor's legislative council may be exercised notwithstanding any vacancy in the council.

1. Section 72A was inserted by Part I of Sch. I of the Government of India Act, 1919 (9 & 10, Geo. 5, ch. 101).

(4) Subject as aforesaid, provision may be made by rules under this Act as to—

- (a) the term of office of nominated members of governors' legislative councils and the manner of filling casual vacancies occurring by reason of absence of members from India, inability to attend to duty, death, acceptance of office, resignation duly accepted or otherwise; and
- (b) the conditions under which and manner in which persons may be nominated as members of governors' legislative councils and;
- (c) the qualification of electors, the constitution of constituencies, and the method of election for governors' legislative councils, including the number of members to be elected by communal and other electorates, and any matters incidental or ancillary thereto; and
- (d) the qualifications for being and for being nominated or elected a member of any such council; and
- (e) the final decision of doubts or disputes as to the validity of any election; and
- (f) the manner in which the rules are to be carried into effect;

Provided that rules as to any such matters as aforesaid may provide for delegating to the local government such power as may be specified in the rules of making subsidiary regulations affecting the same matters.

(5) Subject to any such rules any person who is a ruler or subject of any State in India may be nominated as a member of a governor's legislative council.]

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[**72B. Sessions and duration of governors' legislative councils :** (1) Every governor's legislative council shall continue for three years from its first meeting :

Provided that—

- (a) the council may be sooner dissolved by the governor; and
- (b) the said period may be extended by the governor for a period not exceeding one year, by notification in the official gazette of the province, if in special circumstances (to be specified in the notification) he so thinks fit; and
- (c) after the dissolution of the council the governor shall appoint a date not more than six months or, with the sanction of the Secretary of State, not more than nine months from the date of dissolution for the next session of the council.

1. Sections 72B & 72C were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

(2) A Governor may appoint such times and places for holding the sessions of his legislative council as he thinks fit, and may also, by notification or otherwise, prorogue the council.

(3) Any meeting of a governor's legislative council may be adjourned by the person presiding.

(4) All questions in a governor's legislative council shall be determined by the majority of votes of the members present other than the person presiding, who shall, however, have and exercise a casting vote in the case of any equality of votes.

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[**72C. Presidents of Governors' Legislative Councils:** (1) There shall be a president of a governor's legislative council, who shall, until the expiration of a period of four years from the first meeting of the council as constituted under this Act, be a person appointed by the Governor, and shall thereafter be a member of the council elected by the council and approved by the governor :

Provided that, if at the expiration of such period of four years the council is in session, the president then in office shall continue in office until the end of the current session, and the first election of a president shall take place at the commencement of the next ensuing session.

(2) There shall be a deputy-president of a governor's legislative council who shall preside at meetings of the council in the absence of the president, and shall be a member of the council elected by the council and approved by the governor.

(3) The appointed president of a council shall hold office until the date of the first election of a president by the council under this section, but he may resign office by writing under his hand addressed to the governor, or may be removed from office by order of the governor, and any vacancy occurring before the expiration of the term of office of an appointed president shall be filled by similar appointment for the remainder of such term.

(4) An elected president and a deputy-president shall cease to hold office on ceasing to be members of the council. They may resign office by writing under their hands addressed to the governor, and may be removed from office by a vote of the council with the concurrence of the governor.

(5) The president and the deputy-president shall receive such salaries as may be determined, in the case of an appointed president, by the governor, and in the case of an elected president or deputy-president, by Act of the local legislature.]

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1[72D. Business and procedure in governors' legislative councils: (1)
The provision contained in the section shall have effect with respect to business and procedure in governors' legislative councils.

(1) The estimated annual expenditure and revenue of the province shall be laid in the form of a statement before the council in each year, and the proposals of the local government for the appropriation of provincial revenues and other moneys in any year shall be submitted to the vote of the council in the form of demands for grants. The Council may assent, refuse its assent, to a demand, or may reduce the amount therein referred to either by a reduction of the whole grant or by the omission or reduction of any of the items of expenditure of which the grant is composed.

Provided that :

(a) the local government shall have power, in relation to any such demand to act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, if the demand related to a reserved subject, and the governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject ; and

(b) the governor shall have power in cases of emergency to authorise such expenditure as may be in his opinion necessary for the safety or tranquility of the province, or for the carrying on of any department ; and

(c) no proposal for the appropriation of any such revenues or other moneys for any purpose shall be made except on the recommendation of the governor, communicated to the council.

(3) Nothing in the foregoing sub-section shall require proposals to be submitted to the council relating to the following heads of expenditure :

(i) contributions payable by the local government to the Governor-General in Council; and

(ii) interest and sinking fund charges on loans; and

(iii) expenditure of which the amount is prescribed by or under any law; and

²[(iv) Salaries and pensions payable to or to the dependents of—

(a) persons appointed by or with the approval of His Majesty or by the Secretary of State in Council;

1. Section 72D was inserted by Part I of Sub. II of the Government of India Act, 1919, (9 & 10 Geo. 5, ch. 101). ²⁵ Pat. 595. A.I.R. 1925 Cal. 373. 2. These paragraphs were substituted for the original paragraphs by the Government of India (Civil Services) Act, 1925 (15 and 16 Geo. 5, ch. 83.)

- (b) Judges of the high court of the province,
- (c) the advocate-general;
- (d) persons appointed before the first day of April 1924, by the Governor-General in Council or by a local government to services or posts classified by rules under this Act as superior services or posts; and
- (v) Sums payable to any person who is or has been in the civil service of the Crown in India under any order of the Secretary of State in Council, of the Governor-General in Council, or of a governor made upon an appeal made to him in pursuance of rules made under this Act.]

¹[For the purposes of this sub-section the expression 'salaries and pensions' includes remuneration, allowances, gratuities, any contributions (whether by way of interest or otherwise) out of the revenues of India to any provident fund or family pension fund, and any other payments or emoluments payable to or on account of a person in respect of his office.]

(4) Where any Bill has been introduced or is proposed to be introduced or any amendment to a Bill is moved or proposed to be moved, the governor may certify that the Bill or any clause of it or the amendment affects the safety or tranquillity of his province or any part of it or of another province, and may direct that no proceedings or no further proceedings shall be taken by the council in relation to the Bill, clause or amendment, and effect shall be given to any such direction.

(5) Provision may be made by rules under this Act for the purpose of carrying into effect the foregoing provisions of this section and for regulating the course of business in council, and as to the persons to preside over meetings thereof in the absence of the president, and deputy-president, and the preservation of order at meetings; and the rules may provide for the number of members required to constitute a quorum and for prohibiting or regulating the asking of questions on and the discussion of any subject specified in the rules.

(6) Standing orders may be made providing for the conduct of business and the procedure to be followed in the council in so far as these matters are not provided for by rules made under this Act. The first standing orders shall be made by the governor in council, but may subject to the assent of the governor, be altered by the local legislatures. Any standing order made as

1. This paragraph was inserted by the Government of India (Civil Services) Act, 1925 15 and 16 Geo. 5, ch. 83)

aforesaid, which is repugnant to the provisions of any rules made under this Act shall, to the extent of that repugnancy but not otherwise, be void.

(7) Subject to the rules and standing orders affecting the council, there shall be freedom of speech in the governors' legislative councils. No person shall be liable to any proceedings in any court by reason of his speech or vote in any such council, or by reason of anything contained in any official report of the proceedings of any such council.

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[72E. Provision for case of failure to pass legislation in governors' legislative councils: (1) Where a governor's legislative council has refused leave to introduce, or has failed to pass in form recommended by the governor any Bill relating to a reserved subject, the governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon the Bill shall, notwithstanding that the council have not consented thereto, be deemed to have passed, and shall on signature by the governor become an Act of the local legislature in the form of the Bill as originally introduced in the council or (as the case may be) in the form recommended to the council by the governor.

(2) Every such Act shall be expressed to be made by the governor, and the governor shall forthwith send an authentic copy thereof to the Governor-General, who shall reserve the Act for the signification of His Majesty's pleasure, and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor General, the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to :

Provided that where in the opinion of the Governor-General a state of emergency exists which justifies such action, he may, instead of reserving such act, signify his assent thereto, and thereupon the Act shall have such force and effect as aforesaid, subject however to disallowance by His Majesty in Council.

1. Section 72E was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101),

(3) An Act made under this section shall as soon as practicable after being made be laid before each House of Parliament, and an Act which is required to be presented for His Majesty's assent shall not be so presented until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat.]

(B) LIEUTENANT-GOVERNORS' AND CHIEF COMMISSIONERS' PROVINCES

73. Legislative councils of lieutenant-governors and chief commissioners : (1) For purposes of legislation, the council of ¹[... ..] a lieutenant-governor having an executive council, shall consist of the members of his executive council ²[and of members nominated as hereinafter provided].

³(2)

(3) The legislative council of a lieutenant-governor not having an executive council, or of a chief commissioner, shall consist of members nominated or elected ⁴[as hereinafter provided.]

⁵(4) * * * * *

74. Constitution of legislative councils in Bengal, Madras and Bombay : Omitted by Part II of Schedule II of 9 and 10 Geo. 5, ch. 101.

75. Meetings of legislative councils of Bengal, Madras and Bombay : Omitted by Part II of Schedule II of 9 and 10 Geo. 5, ch. 101.

76. Constitution of legislative councils of lieutenant-governors and chief commissioners : (1) The number of members nominated or elected to the legislative council of a lieutenant-governor or chief commissioner, the number of such members required to constitute a quorum, the term of office of such members and the manner of filling casual vacancies occurring by reason of absence from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise shall, in the case of each council, be such as may be prescribed by rules made under this ⁶[section].

⁷[Provided that the number of members so nominated or elected shall not, in the case of the legislative council of a lieutenant-governor, exceed one hundred.]

(2) At least one-third of the persons so nominated or elected to the legislative council of a lieutenant-governor or chief commissioner must be ⁸[non-officials].

1. The words "a governor, or of" were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. These words were substituted for the words "with the addition of members nominated or elected in accordance with rules made under this Act" by *ibid.* 3. Sub-section (2) was omitted by Part III of *ibid.* 4. These words were substituted for the words "in accordance with the rules made under this Act" by Part II of *ibid.* 5. Sub-section (4) was omitted by *ibid.* 6. This word was substituted for the word "Act" by *ibid.* 7. This proviso was substituted by Part I, *ibid.* 8. This word was substituted for the words "persons not in the civil or military service of the Crown in India" by *ibid.*

(3) The Governor-General in council may, with the approval of the Secretary of State in council make rules as to the conditions under which and manner in which persons resident in India may be nominated or elected members of any of those legislative councils, and as to the qualifications for being nominated or elected, a member of any of those councils, and as to any other matter for which rules are authorised to be made under this section, and as to the manner in which those rules are to be carried into effect.

¹[(3a) Rules made under this section may provide for the final decision of doubts or disputes as to the validity of an election.]

¹[(3b) Subject to any rules made under this section any person who is a ruler or subject of any state in India shall be eligible to be nominated a member of a legislative council.]

(4) All rules made under this section shall be laid before both Houses of Parliament as soon as may be after they are made, and those rules shall not be subject to repeal or alteration by the ²[Indian legislature or the local legislature.]

77. Power to constitute local legislature in lieutenant-governors' and chief commissioners' provinces: (1) When a lieutenant-governorship is constituted under this Act, the Governor-General in Council may, by notification with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute the lieutenant-governor in legislative council of the province, and define the limits of the province for which the lieutenant-governor in legislative council is to exercise legislative powers.

(2) The Governor-General in Council may, by notification, extend the provisions of this Act relating to legislative councils of lieutenant-governors, subject to such modifications and adaptations as he may consider necessary to any province for the time being under a chief commissioner.

78. Meetings of legislative councils of lieutenant-governors and chief commissioners: (1) ⁴[A lieutenant governor or a chief commissioner who has legislative council may appoint such times and places for holding the sessions of his legislative council as he thinks fit, and may also, by notification or otherwise, prorogue the council, and any meeting of the legislative council of a lieutenant-governor or chief commissioner may be adjourned by the person presiding.] Every lieutenant-governor who has no executive council, and every chief commissioner who has legislative council, shall appoint a member of his legislative council to be vice-president thereof.

1. Sub-section (3a) and (3b) were inserted by section 1 (2) of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37). 2. These words were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). 3. These words were inserted by Part I, *ibid.*

(2) In the absence of the lieutenant-governor or chief commissioner from any meeting of the legislative council the person to preside thereat shall be the vice-president of the council, or in his absence, the member of the council who is highest in official rank among those holding office under the Crown who are present at the meeting, or, during the discussion of the annual financial statement or of any matter of general public interest, ¹[or when questions are asked,] the vice-president, or the member appointed to preside ²[* * *].

³[(3) All questions at a meeting of the legislative council of a lieutenant-governor or chief commissioner shall be determined by a majority of votes of the members present other than the lieutenant-governor, chief commissioner, or presiding member, who shall, however, have and exercise a casting vote in case of an equality of votes.

⁴[(4) Subject to rules affecting the council, there shall be freedom of speech in the legislative council of lieutenant-governors and chief commissioners. No person shall be liable to any proceedings in any court by reason of his speech or vote in those councils, or by reason of anything in any official report of the proceedings of those councils.]

79. Powers of local legislatures: Omitted by Part II of Sch. II of 9 and 10 Geo. 5, ch. 101.

80. ⁴Business at meetings of councils of lieutenant-governors and chief commissioners: (1) At a meeting of local legislative council ⁵[(other than a governor's legislative council)] no motion shall be entertained other than a motion for leave to introduce a measure into the council for the purpose of enactment, or having reference to a measure introduced or proposed to be introduced into the council for that purpose, or having reference to some rule for the conduct of business in the council, and business shall be transacted other than the consideration of those motions or the alteration of those rules.

⁶(2) * * * * *

(3) Notwithstanding anything in the foregoing provisions of this section the local government ⁷ [of a province other than a governor's province] may with the sanction of the Governor-General in Council, make rules authorising at any meeting of the local legislative council, discussion of the annual financial

1. These words were inserted by Sch. I of the government of India (Amendment) Act 1916 (6 & 7 Geo. 5, ch. 37). 2. The words 'in accordance with rules made under this Act' were omitted by Part II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 3. Sub-sections (3) and (4) substituted for sub-section (3) by *ibid.* 4. 41 Bom. 390; 47 All. 513; 44 Cal. 219. 5. These words were inserted by *ibid.* 6. Sub-section (2) was omitted by *ibid.* 7. These words were inserted by *ibid.*

statement of the local government, and of any matter of general public interest and the asking of questions, under such conditions and restrictions as may be prescribed in the rules. Rules made under this sub-section for any council may provide for the appointment of a member of the council to preside at any such discussion ¹[or when questions are asked] in the place of the ²[*] lieutenant-governor or chief commissioner, as the case may be, and of the vice-president, and shall be laid before both Houses of Parliament as soon as may be after they are made, and shall not be subject to repeal or alteration by the ³[Indian legislature] or the local legislature.

⁴(4) The local government of any province (other than a governor's province) for which a local legislative council is hereafter constituted under this Act shall, before the first meeting of that council, and with the sanction of the Governor-General in Council make rules for the conduct of legislative business in that council (including rules for prescribing the mode of promulgation of laws passed by that council.)

⁵(5) The local legislature of any such province may, subject to the assent of the lieutenant governor or chief commissioner, alter the rules for the conduct of legislative business in the local council (including rules prescribing the mode of promulgation and authentication of laws passed by the council), but any alteration so made may be disallowed by the Governor-General in Council, and if so disallowed shall have no effect.]

(C) GENERAL

⁶[**80A. Powers of Local Legislatures:** The local legislature of any province has power, subject to the provisions of this Act, to make laws for the peace and good government of the territories for the time being constituting that province.

(2) The local legislature of any province may, subject to the provisions of the sub-section next following, repeal or alter as to that province any law made either before or after the commencement of this Act by any authority in British India other than that local legislature.

(3) The local legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law—

1. These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, ch. 37). 2. The word "governor" was omitted Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 3. These words were substituted for the words "Governor in Legislative Council" by *ibid.* 4. Sub-section (4) was inserted by *ibid.* 5 Sub-section (5) was inserted by *ibid.* 6. Section 80A was inserted by Part I *ibid.*

- (a) imposing or authorising the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under this Act ; or
- (b) affecting the public debt of India or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in council for the general purposes of the government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty ; or
- (c) affecting the discipline or maintenance of any part of His Majesty's naval, military, or air forces ; or
- (d) affecting the relations of the government with foreign princes or states ; or
- (e) regulating any central subject ; or
- (f) regulating any provincial subject which has been declared by rules under this Act to be, either in whole or in part, subject to legislation by the Indian Legislature, in respect of any matter to which such declaration applies; or
- (g) affecting any power expressly reserved to the Governor-General in Council by any law for the time being in force ; or
- (h) altering or repealing the provisions of any law which, having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that local legislature, is declared by rules under this Act to be a law which cannot be repealed or altered by the local legislature without previous sanction ; or
- (i) altering or repealing any provision of an Act of the Indian legislature made after the commencement of the Government of India Act, 1919, which by the provisions of such first-mentioned Act, may not be repealed or altered by the local legislature without previous sanction:

Provided that an Act or a provision of an Act made by a local legislature and subsequently assented to by the Governor-General in pursuance of this Act, shall not be deemed invalid by reason only of its requiring the previous sanction of the Governor-General under this Act.

(4) The local legislature of any province has not power to make any law affecting any Act of Parliament.]

1[80B. Vacation of seat in local legislative council : An official shall not be qualified for election as a member of a local legislative council, and if any non-official member of local legislative council, whether elected or nominated, accepts any office in the service of the Crown in India, his seat on the council shall become vacant:

Provided that for the purposes of this provision, a minister shall not be deemed to be an official and a person shall not be deemed to accept office on appointment as a minister.]

2[80C. Financial Proposals : It shall not be lawful for any member of any local legislative council to introduce, without the previous sanction of the governor, lieutenant-governor or chief commissioner, any measure affecting the public revenues of a province, or imposing any charge on those revenues.

81. Assent to Bills: (1) When ²[a Bill] has been passed ³[by] a local legislative council, the governor, lieutenant-governor or chief commissioner, ⁴[* *] may declare that he assents to or withholds his assent from the ⁵[Bill].

(2) If the governor, lieutenant-governor or chief commissioner withholds assent from any such ⁶[Bill], the ⁷[Bill] ⁸[shall not become an Act].

(3) If the governor, lieutenant-governor or chief commissioner assents to any such ⁹[Bill], he shall forthwith send an authentic copy of the Act to the Governor-General, and the Act shall not have validity until the Governor-General has assented thereto and that assent has been signified by the Governor-General to, and published by, the governor, lieutenant-governor or chief commissioner.

(4) Where the Governor-General withholds his assent from any such Act he shall signify to the governor, lieutenant-governor or chief commissioner in writing his reason for so withholding his assent.

1[81A. Return and reservation of Bills : (1) Where a Bill has been passed by a local legislative council, the governor, lieutenant-governor or chief commissioner may instead of declaring that he assents to or withholds his assent from the Bill, return the Bill to the council for reconsideration, either in whole or in part, together with any amendments which he may recommend, or, in cases prescribed by rules under this Act, may, and if the rules so require, shall, reserve the Bill for the consideration of the Governor-General.

(2) Where a Bill is reserved for the consideration of the Governor-General, the following provisions shall apply:—

1. Sections 80B and 80C were inserted by Part I of Sch. II of the Government of India Act, 1919, (9&10 Geo. 5, ch. 101). 2. These words were substituted for the words "an Act" by Part II, *ibid.* 3. This word was substituted for the words "at a meeting of" by *ibid.* 4. The words "whether, he was or was not present in Council at the passing of the Act" were omitted by Part III, *ibid.* 5. This word was substituted for the word "Act" by Part II, *ibid.* 6. These words were substituted for the words "has no effect" by *ibid.* 7. Section 81A was inserted by *ibid.*

- a) The governor, lieutenant-governor or chief commissioner may, at any time within six months from the date of the reservation of the Bill, with the consent of the Governor-General, return the Bill for further consideration by the council with a recommendation that the council shall consider amendments thereto :
- (b) After any Bill so returned has been further considered by the council, together with any recommendations made by the governor, lieutenant-governor, or chief commissioner relating thereto, the Bill, if re-affirmed with or without amendment, may be again presented to the governor, lieutenant-governor or chief commissioner :
- (c) Any Bill reserved for the consideration of the Governor-General shall, if assented to by the Governor-General within a period of six months from the date of such reservation, become law on due publication of such assent, in the same way as a Bill assented to by the governor, lieutenant-governor or chief commissioner, but if not assented to by the Governor-General within such period of six months, shall lapse and be of no effect unless before the expiration of that period either—
 - (i) the Bill has been returned by the governor, lieutenant-governor or chief commissioner for further consideration by the council ; or
 - (ii) in the case of the council not being in session, a notification has been published of an intention so to return the Bill at the commencement of the next session.

(3) The Governor-General may except where the Bill has been reserved for his consideration, instead of assenting to or withholding his assent from any act passed by a local legislature, declare that he reserves the Act for the signification of His Majesty's pleasure thereon, and in such case the Act shall not have validity until His Majesty in Council has signified his assent and his assent has been notified by the Governor-General.]

82. Power of Crown to disallow Acts of local legislatures : (1) When ¹[an Act] has been assented to by the Governor-General he shall send to the Secretary of State an authentic copy thereof, and it shall be lawful for His Majesty ²[in Council] to signify ³[*] his disallowance of ¹[the Act].

(2) Where the disallowance of ¹[an Act] has been so signified, the governor, lieutenant-governor or chief commissioner shall forthwith notify the disallowance, and thereupon the Act, as from the date of the notification, shall become void accordingly.

1. These words were substituted for the words " any such Act " by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. These words were inserted by *ibid.* 3. The words " through the Secretary of State in Council " were omitted by *ibid.*

83. [Rules for conduct of legislative business.]: Omitted by Part II of Schedule II of 9 and 10 Geo. 5, ch. 101.

VALIDITY OF INDIAN LAWS

84. Removal of doubts as to validity of certain Indian Laws: (1) A law shall not, be deemed invalid solely on account of any one or more of the following reasons :—

- (a) in the case of ¹[an Act of the Indian legislature] ²[or a local legislature], because it affects the prerogative of the Crown ; or
- (b) in the case of any law, because the requisite proportion of ³[non-official members] was not complete at the date of its introduction into the council or its enactment ; or
- (c) in the case of ⁴[an Act of] a local legislature, because it confers on magistrates, being justices of the peace, the same jurisdiction over European British subjects as that legislature, by Acts duly made, could lawfully confer on magistrates in the exercise of authority over other British subjects in the like cases.

⁵[A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void.]

⁶[(2) Nothing in the Government of India Act, 1919, or this Act, or in any rule made thereunder, shall be construed as diminishing in any respect the powers of the Indian legislature as laid down in section sixty-five of this Act, and the validity of any Act of the Indian legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a provincial subject, or a central subject, as the case may be, and the validity of any Act made by the governor of a province shall not be so open to question on the ground that it does not relate to a reserved subject.]

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1. These words were substituted for the words " a law made by the Governor-General in Legislative Council " by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. These words were inserted by section 2 (2) of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, ch. 37). 3. These words were substituted for the words " members not holding office under the Crown in India " by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101.) 4. These words were substituted for the words " a law made by " by *ibid*. 5. This sub-section was inserted by Part I of *ibid*.

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PART VIA

STATUTORY COMMISSION

[84A. Statutory Commission : (1) ¹[Within] ten years after the passing of the Government of India Act, 1919, the Secretary of State with the concurrence of both Houses of Parliament shall submit for the approval of His Majesty the names of persons to act as commission for the purpose of this section.

(2) The persons whose names are submitted, if approved by His Majesty, shall be a commission for the purpose of inquiring into the working of the system of government, the growth of education, and the development of representative institutions, in British India, and matters connected therewith, and the commission shall report as to whether and to what extent it is desirable to establish the principle of responsible government, or to extend, modify, or restrict the degree of responsible government then existing therein, including the question whether the establishment of second chambers of the local legislatures is or is not desirable.

(3) The commission shall also inquire into and report on any other matter affecting British India and the provinces, which may be referred to the commission by His Majesty.]

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1. Section 84A was inserted by Part 1 of Sch. 11 of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. This word was substituted for the words "At the expiration of" by the Government of India (Statutory Commission) Act, 1927 (18 & 19 Geo. 5, ch. 24.)

PART VII

SALARIES, LEAVE OF ABSENCE, VACATION OF OFFICE,
APPOINTMENTS, ETC.

85. Salaries and allowances of Governor-General and certain other officials in India: (4) There shall be paid to the Governor-General of India and to the other persons mentioned in the Second Schedule to this act, out of the revenues of India, such salaries, not exceeding in any case the maximum specified in that behalf in that Schedule, and such allowances (if any) for equipment and voyage, as the Secretary of State in Council may by order fix in that behalf, and, subject to or in default of any such order, as are payable at the commencement of this Act:

(2) Provided as follows:—

- (a) an order affecting salaries of members of the Governor General's executive council may not be made without concurrence of a majority of votes at a meeting of the Council of India ;
- (b) if any person to whom this section applies holds or enjoys any pension or salary, or any office of profit under the Crown or under any public office, his salary, under this section shall be reduced by the amount of the pension or profits of office so held or enjoyed by him;
- (c) nothing in the provisions of this section with respect to allowances shall authorise the imposition of any additional charge on the revenues of India.

(3) The remuneration payable to a person under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office, during his continuance therein.

[Provided that nothing in this sub-section shall apply to the allowance or other forms of profit and advantage which may have been sanctioned for such persons by the Secretary of State in Council.]

86. Power to grant leave of absence to Governor-General, etc.: (1) The Secretary of State in Council may grant to the Governor General and, on

1. This proviso was inserted by Part III of Sch. 11 of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. This s. 86 was substituted by the Government of India (Leave of Absence) Act, 1924 (14 and 15 Geo. 5, ch. 28) for the original s. 86 which ran as follows :—

85. (1) The Governor-General in Council may grant to any of the members of his executive council (other than the commander-in-Chief), and a governor in council [and a lieutenant governor in council] may grant to any member of his executive council, leave of absence under medical certificate for a period not exceeding six months.

(2) Where a member of Council obtains leave of absence in pursuance of this section he shall retain his office during his absence, and shall on his return and resumption of his duties be entitled to receive half his salary for the period of his absence, but if his absence exceeds six months his office shall become vacant,

recommendation of the Governor-General in Council, to the Commander-in-Chief, leave of absence for urgent reasons of public interest, or of health or of private affairs.

(2) The Secretary of State in Council may, on the recommendation of the Governor-General in Council, grant to a Governor, and the Governor-General in Council, or a Governor in Council, or a Lieutenant-Governor in Council, as the case may be, may grant to any member of his Executive Council (other than the Commander-in-Chief), leave of absence for urgent reasons of health or of private affairs.

(3) Leave of absence shall not be granted to any person in pursuance of this section for any period exceeding four months nor more than once during his tenure of office :

Provided that the Secretary of State in Council may, if he thinks fit, extend any period of leave so granted, but in any such case the reasons for the extension shall be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament.

(4) Where leave of absence is granted to any person in pursuance of this section, he shall retain his office during the period of leave as originally granted, or, if that period is extended by the Secretary of State in Council, during the period as so extended, but, if his absence exceeds that period, his office shall be deemed to have become vacant in the case of a person granted leave for urgent reasons of public interest as from the termination of that period and in any other case as from the commencement of his absence.

(5) Where a person obtains leave of absence in pursuance of this section, he shall be entitled to receive during his absence such leave-allowances as may be prescribed by rules made by the Secretary of State in Council, but, if he does not resume his duties upon the termination of the period of the leave, he shall, unless the Secretary of State in Council otherwise directs re-pay, in such manner as may be so prescribed as aforesaid, any leave-allowances received under this sub-section.

(6) If the Governor-General or the Commander-in-Chief is granted leave for urgent reasons of public interest, the Secretary of State in Council may, in addition to the leave-allowances to which he is entitled under this section, grant to him such further allowances in respect of travelling expenses as the Secretary of State in Council may think fit.

(7) Rules made under this section shall be laid before both Houses of Parliament as soon as may be after they are made.]

[87. Acting appointments during the absence of the Governor-General, etc., on leave: (1) Where leave is granted in pursuance of the foregoing section to the Governor-General, or the Commander-in-Chief, or to a governor, a person shall be appointed to act in his place during his absence, and the appointment shall be made by His Majesty by warrant under the Royal Sign Manual. The person so appointed during the absence of the Commander-in-Chief, may, if the Commander-in-Chief, was a member of the Executive Council of the Governor-General, be also appointed by the Governor-General in Council to be a temporary member of that Council.

(2) The person so appointed shall, until the return to duty of the permanent holder of the office, or, if he does not return, until a successor arrives, hold and execute the office to which he has been appointed and shall have and may exercise all the rights and powers thereof and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing the emoluments and advantages (if any) to which he was entitled at the time of his being appointed to that office.

(3) When during the absence on leave of the Governor-General a Governor is appointed to act in his place, the provision of this section relating to the appointment of a person to act in the place of a Governor to whom leave of absence has been granted in pursuance of the foregoing section shall apply in the same manner as if leave of absence had been so granted to the Governor.]

88. [Conditional appointments]: Omitted by part III of Sch. II of 9 and 10 Geo. 5, ch. 101.

89. Power for Governor-General to exercise powers before taking seat: (1) If any person ¹[* * *] appointed ²[*] to ³[the office of Governor-General], is in India on or after the event on which he is to succeed, and think it necessary to exercise the powers of Governor-General before he takes his seat in council, he may make known by notification his appointment and his intention to assume the office of Governor-General.

1. This s. 87 was substituted by the Government of India (Leave of Absence) Act, 1924 (14 and 15 Geo. 5, ch. 28) for the original s. 87 which ran as follows:—

87. (1) If the Governor-General, or a governor, or the Commander-in-Chief of His Majesty's forces in India, and [save in the case of absence on special duty or on leave under a medical certificate] if any [*] member of the executive council of the Governor-General [(other than the Commander-in-Chief)] or any member of the executive council of a governor [or of a lieutenant-governor] departs from India, intending to return to Europe his office shall thereupon become vacant.

(2)—(5): repealed by Sch. II of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37)

2. The word "entitled under a conditional appointment to succeed to the office of Governor-General or" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 & 19 Geo. 5, ch. 101). 3. The word "absolutely" was omitted by *ibid.* 4. These words were substituted for the words "that office" by *ibid.*

(2) After the notification, and thenceforth until he repairs to the place where the council may assemble, he may exercise alone all or any of the powers which might be exercised by the Governor-General in Council

(3) All acts done in the council after the date of the notification but before the communication thereof to the Council, shall be valid, subject, nevertheless, to revocation or alteration by the person who has so assumed the office of Governor-General.

(4) When the office of Governor-General is assumed under the foregoing provision, the vice-president, or, if he is absent, the senior ¹[member of the council (other than the Commander-in-Chief)] then present, shall preside therein, with the same powers as the Governor-General would have had, if present.

90. Temporary vacancy in office of Governor-General : (1) If a vacancy occurs in the office of Governor-General when there is no ²[* ~] successor in India to supply the vacancy, the governor ³[of a presidency] who was first appointed to the office of governor ⁴[of a presidency] by His Majesty shall hold and execute the office of Governor-General until a successor arrives or until some person in India is duly appointed thereto.

(2) Every such acting Governor-General, while acting as such, shall have and may exercise all the rights and powers of the office of Governor-General, and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing the salary and allowances appertaining to his office of governor; and his office of governor shall be supplied, for the time during which he acts as Governor-General in the manner directed by this Act with respect to vacancies in the office of governor.

(3) If, on the vacancy occurring, it appears to the governor, who by virtue of this section holds and executes the office of Governor-General, necessary to exercise the powers thereof before he takes his seat in council, he may make known by notification his appointment, and his intention to assume the office of Governor-General, and thereupon the provisions of ⁴[section eighty-nine of this Act] ⁵[* *] shall apply.

(4) Until such a governor has assumed the office of Governor-General, if no ⁶[... ..] successor is on the spot to supply such vacancy, the vice-president, or if he is absent, the senior ⁷[...] member of the executive council ⁸[(other than the Commander-in-Chief)] shall hold and execute the office of Governor-General until the vacancy is filled in accordance with provisions of this Act.

1. These words were substituted for the words "ordinary member of the Council" by Part II of Sch. II of the Government of India Act, 1919, (9 & 10 Geo. 5, ch. 10). 2. The words "conditional or other" were omitted by Part III, *ibid*. 3. These words were inserted by Part II, *ibid*. 4. The words were substituted for the words "this Act" by Part III, *ibid*. 5. The words "respecting the assumption of the office by a person conditionally appointed to succeed thereto" were omitted by *ibid*. 6. The words "conditional or other" were omitted by *ibid*. 7. The word "ordinary" was omitted by Part II, *ibid*. 8. These words were inserted by *ibid*.

(5) Every vice-president or other member of Council so acting as Governor General, while so acting, shall have and may exercise all the rights and powers of the office of Governor-General and shall be entitled to receive the emoluments and advantages appertaining to the office, foregoing his salary and allowances as member of council for that period.

91. Temporary vacancy in office of governor: (1) If a vacancy occurs in the office of governor when no ¹[...] successor is on the spot to supply the vacancy, the vice-president, or, if he is absent, the senior member of the governor's executive council or, if there is no council, the chief secretary to the local government, shall hold and execute the office of governor until a successor arrives, or until some other person on the spot is duly appointed thereto.

(2) Every such acting governor, shall while acting as such, be entitled to receive the emoluments and advantages appertaining to the office of governor, foregoing the salary and allowances appertaining to his office of member of council or secretary.

92. Temporary vacancy in office of member of an executive council: (1) If a vacancy occurs in the office of ²[a member] of the executive council of the Governor-General ³[other than the Commander-in-Chief], or a member of the executive council of a governor, and there is no ⁴[...] successor present on the spot, the Governor-General in Council, as the case may be, shall supply the vacancy by appointing a temporary member of council.

(2) Until a successor arrives the person so appointed shall hold and execute office to which he has been appointed and shall have and may exercise all the rights and powers thereof and shall be entitled to receive the emoluments and advantages to which he was entitled at the time of his being appointed to that office.

(3) If ⁴[a member] of the executive council of the Governor-General ⁵[other than the Commander-in-Chief], or any member of the executive council of governor is, by infirmity or otherwise, rendered incapable of acting or attending to act as such, or is absent on leave, ⁶[or special duty] ⁷[...] the Governor General in council or governor in council, as the case may be, shall appoint some person to be a temporary member of council.

⁸[(4) Until the return to duty of the member so incapable or absent, the person ⁹[...] temporarily appointed shall hold and execute the office to which he has been appointed, and shall have and may exercise all

1. The words "conditional or other" were omitted by Part III of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. These words were substituted for the words "an ordinary member" by Part II, *ibid*. 3. These words were inserted by *ibid*. 4. These words were substituted for the words "any ordinary member" by *ibid*. 5. These words were inserted by *ibid*. 6. These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (9 & 10 Geo. 5, ch. 37). 7. Certain words were omitted by Part III of *ibid*. 8. Sub-section (4) and (4A) were substituted by S. 2 of the Government of India (Leave of Absence) Act, 1924 (14 & 15 Geo. 5, ch. 28). 9. The words "conditionally or" were omitted by Part III of *ibid*.

the rights and powers thereof, and shall be entitled to receive the emoluments and advantages (if any) to which he was entitled at the time of his being appointed to that office.

¹(4a) When a member of an Executive Council is by infirmity or otherwise rendered incapable of acting or attending to act as such and a temporary member of council is appointed in his place, the absent member shall be entitled to receive half his salary for the period of his absence.]

(5) Provided as follows:—

- (a) no person may be appointed a temporary member of council who might not have been appointed ¹[* * *] to fill the vacancy supplied by the temporary appointment; and
- (b) if the Secretary of State informs the Governor-General that it is not the intention of His Majesty to fill a vacancy in the Governor-General's executive council, no temporary appointment may be made under this section to fill the vacancy, and if any such temporary appointment has been made before the date of the receipt of the information by the Governor-General, the tenure of the person temporarily appointed shall cease from that date.

93. Vacancies in legislative council: (1) A nominated or elected member of ²[either chamber of the Indian legislature] or of a local legislative council may resign his office to the Governor-General or to the governor, lieutenant-governor or chief commissioner as the case may be and on the acceptance of the resignation the office shall become vacant.

(2) If for a period of two consecutive months any such member is absent from India or unable to attend to the duties of his office, the Governor-General, lieutenant-governor, or chief commissioner, as the case may be, by notification published in the government gazette, declare that the seat in council of that member has become vacant.

94. Leave: Subject to the provisions of this Act, the Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, make rules as to the absence on leave ³[or special duty] of persons in the service of the Crown in India, and the terms as to continuance, variation or cessation of pay, salary and allowances on which any such ⁴[absence may be permitted].

1. Subs. ss. (4) and (4A) were substituted by 14 & 15 Geo. 5, ch. 28 for the original sub-s. (4) which ran as follows—

Until the return to duty of the member so incapable or absent the person [* * *] temporarily appointed shall hold and execute the office to which he has been appointed, and shall have and may exercise all the rights and powers thereof, and shall be entitled to receive half of the salary of the member of council whose place he fills, and also half of the salary of any other office which he may hold, if he holds any such office, the remaining half of such last named salary being at the disposal of the governor-general in council or governor in council as the case may be.

2. The words "under this Act" were omitted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 3. These words were substituted for the words "the Indian Legislative Council" by *ibid.* 4. These words were inserted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, ch. 37). 5. These words were substituted for the words "leave may be granted" by *ibid.*

95. Power to make rules as to Indian military appointments: (1) The Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, may make rules for distributing between the several authorities in India the power of making appointments to and promotions in ¹[military] offices under the Crown in India, and may reinstate ¹[military] officers and servants suspended or removed by any of those authorities.

(2) Subject to such rules, all appointments to ¹[military] offices and commands in India, and all ¹[military] promotions, which, by law, or under any regulations, usage or custom, are, at the commencement of this Act, made by any authority in India, shall, subject to the qualifications, conditions, and restrictions then affecting such appointments and promotions, respectively, continue to be made in India by the like authority.

96. No disabilities in respect of religion, colour or place of birth: No native of British India, nor any subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them be disabled from holding any office under the Crown in India.

***[96A. Qualification of rulers and subjects of certain states for office:** Notwithstanding anything in any other enactment, the Governor-General in Council with the approval of the Secretary of State in Council, may, by notification, declare that, subject to any conditions or restrictions prescribed in the notification, any named ruler or subject of any state in India shall be eligible for appointment to any civil or military office under the Crown to which a native of British India may be appointed, or any named subject to any state, or any named member of any independent race or tribe, in territory adjacent to India, shall be eligible for appointment to any such military office.]

PART VIIA

THE CIVIL SERVICES IN INDIA

***[96B. 'The civil services in India:** (1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a governor's province,

1. This word was inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. Section 96A was inserted by section 3 of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, ch. 37). 3. Section 96B was inserted by Part I of Sch. II of Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 4. 54 Cal. 44.

and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the governor of the province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local governments, or authorise the Indian legislature or local legislatures to make laws regulating the public services :

Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the civil services of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable.

(3) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may or may have, become entitled under the provisions in relation to pensions continued in the East India Annuity Funds Act, 1874.

(4) For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf and are confirmed, but any such rules or provisions may be revoked or added to by rules or laws made under this section.

¹[(5) ²No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown

1. This sub-section was inserted by the Government of India (Civil Service) Act, 1925 (15 and 16 Geo. 5, ch. 83). 2. 54 Cal. 44; 57 Cal. 281; 27 A. L. J. 670.

in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under sub-section (2) of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed :

Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision.]

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[96C. Public Service Commission : (1) There shall be established in India a public service commission, consisting of not more than five members of whom one shall be chairman, appointed by the Secretary of State in Council. Each member shall hold office for five years, and may be re-appointed. No member shall be removed before the expiry of his term of office, except by order of the Secretary of State in Council. The qualifications for appointment, and the pay and pension (if any) attaching to the office of chairman and member, shall be prescribed by rules made by the Secretary of State in Council.

(2) The public service commission shall discharge, in regard to recruitment and control of the public service in India, such functions as may be assigned thereto by rules made by the Secretary of State.

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[96D. Financial Control : An auditor-general in India shall be appointed by the Secretary of State in Council, and shall hold office during His Majesty's pleasure. The Secretary of State in Council, shall, by rules, make provision for his pay, powers, duties, and conditions of employment, or for the discharge of his duties in the case of a temporary vacancy or absence from duty.

(2) Subject to any rules made by the Secretary of State in Council, no office may be added to or withdrawn from the public service, and the emoluments of no post may be varied, except after consultation with such finance authority as may be designated in the rules, being an authority of the province or of the Government of India, according as the post is or is not under the control of a local government.]

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[96E. Rules under Part VIIA : Rules made under this Part of this Act shall not be except with the concurrence of the majority of votes at a meeting of the Council of India.

1. Section 96 C, 96 D and 96 E were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

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PART VIII

THE INDIAN CIVIL SERVICE

97. Rules for admission to the Indian Civil Service : (1) The Secretary of State in Council may with the advice and assistance of the Civil Service Commissioners, make rules for the examination, under the superintendence of those Commissioners, of British subjects ¹[and of persons] in respect of whom a declaration has been made under ²[Section 96A of this Act] who are desirous of becoming candidates for appointment to the Indian Civil Service.

(2) The rules shall prescribe the age and qualifications of the candidates, and subjects of examination.

³[(2a) The admission to the Indian Civil Service of a British subject who or whose father or mother was not born within His Majesty's dominions shall be subject to such restrictions as the Secretary of State in Council, with the advice and assistance of the Civil Service Commissioners, may think fit to prescribe, and all such restrictions shall be included in the rules.]

(3) All rules made in pursuance of this section shall be laid before Parliament within fourteen days after the making thereof, or, if Parliament is not then sitting then within fourteen days after the next meeting of Parliament.

(4) The candidates certified to be entitled under the rules shall be recommended for appointment according to the order of their proficiency as shown by their examination.

(5) Such persons only as are so certified may be appointed or admitted to the Indian Civil Service by the Secretary of State in Council.

⁴[(6) Notwithstanding anything in this section, the Secretary of State ⁵[in Council] may make appointments to the Indian Civil Service of persons domiciled in India, in accordance with such rules as may be prescribed by the Secretary of State in Council with the concurrence of the majority of votes at a meeting of the Council of India.

Any rules made under this sub-section shall not have force until they have been laid for thirty days before both Houses of Parliament.]

1. These words were inserted by section 4 of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37). 2. These words were substituted for "the last foregoing section" by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 3. This sub-section was inserted by section 4 of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37). 4. This sub-section was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). 5. These words were inserted by the Government of India (Civil Services) Act, 1925 (15 and 16 Geo. 5, ch. 83).

98. Officers reserved to the Indian Civil Service : Subject to the provisions of this Act, all vacancies happening in any of the office specified or referred to in the third Schedule to this Act, and all such offices which may be created hereafter, shall be filled from amongst the members of the Indian Civil Service.

99. Power to appoint certain persons for reserved offices : (1) The authorities in India, by whom appointments are made to offices in the Indian Civil Service, may appoint to any such office any person of proved merit and ability domiciled in British India and born¹ [.. ..] of parents habitually resident in India and not established there for temporary purposes only, although the person so appointed has not been admitted to that service in accordance with the foregoing provisions of this Act.

(1) Every such appointment shall be made subject to such rules as may be prescribed by the Governor-General in Council and sanctioned by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council of India.

(3) The Governor-General in Council may, by resolution, define and limit the qualification of persons who may be appointed under this section, but every resolution made for that purpose shall be subject to the sanction of the Secretary of State in Council, and shall not have force until it has been laid for thirty days before both Houses of Parliament.

100. Power to make provisional appointments in certain cases :

(1) When it appears to the authority in India by whom an appointment is to be made to any office reserved to members of the Indian Civil Service, that a person not being a member of that service ought, under the special circumstances of the case, to be appointed thereto, the authority may appoint thereto any person who has, before his appointment, fulfilled all the tests (if any) which would be imposed in the like case on a member of that service.

(2) Every such appointment shall be provisional only, and shall forthwith be reported to the Secretary of State, with the special reasons for making it; and unless the Secretary of State in Council approves the appointment, with the concurrence of a majority of votes at a meeting of the Council of India, and within twelve months from the date of the appointment intimates such approval to the authority by whom the appointment was made, the appointment shall be cancelled.

1. The words "in British India" were repealed by Sch. I of the Government of India (Amendment) Act, 1916 (6 and 7 Geo. 5, ch. 37).

PART IX

THE INDIAN HIGH COURTS

CONSTITUTION

101. Constitution of High courts : (1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent.

(2) Each high court shall consist of a chief justice and as many other judges as His Majesty may think fit to appoint :

¹Provided as follows :—

- (i) the Governor-General in Council may appoint persons to act as additional judges of any high court, for such period, not exceeding two years, as may be required and the judges so appointed shall whilst so acting, have all the powers of a judge of the high court appointed by His Majesty under this Act.
 - (ii) the maximum number of judges of a high court including the chief justice and additional judges, shall be twenty.
- (3) A judge of a high court must be—
- (a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing; or
 - (b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as or exercised the powers of, a district judge; or
 - (c) a person having held judicial office, not inferior to that of a subordinate judge or judge of a small cause court, for a period of not less than five years; or
 - ²[(d) ³a person who has been a pleader of one of the high courts referred to in this Act, or of any court which is a high court within the meaning of clause 24 of section 3 of the Act of the Indian Legislature known as the General Clauses Act, 1897, for an aggregate period of not less than ten years.]

(4) Provided that not less than one-third of the judges of a high court, including the chief justice but excluding additional judges, must be such barristers or advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

(5) The High court for the North-Western Provinces may be styled the high court of judicature at Allahabad, and the high court at Fort William in Bengal is in this Act referred to as the high court at Calcutta.

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1. 38 M. L. J 787 2. This clause was substituted by the Indian High Courts Act, 1922, 12 & 13 Geo. 5, ch. 20. J. 9 All 627.

102. Tenure of office of judges of high courts : (1) Every judge of a high court shall hold his office during His Majesty's pleasure.

(2) Any such judge may resign his office, in the case of the high court at Calcutta, to the Governor-General in Council, and in other cases to the local Governments.

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103. Precedence of judges of high courts : (1) The chief justice of a high court shall have rank and precedence before the other judges of the same court.

(2) All the other judges of a high court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents.

104. Salaries, &c. of judges of high courts : (1) The Secretary of State in Council may fix salaries, allowances, furloughs, retiring pensions and (where necessary) expenses for equipment and voyage, of the chief justice and other judges of the several high courts, and may alter them, but any such alteration shall not affect the salary of any judge appointed before the date thereof.

(2) The remuneration fixed for a judge under this section shall commence on his taking upon himself the execution of his office and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

(3) If the judge of a high court died during his voyage to India, or within six months after his arrival there, for the purposes of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a judge of a high court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary.

105. Provision for vacancy in the office of chief justice or other judges:

(1) On the occurrence of a vacancy in the office of chief justice of a high court, and during any absence of such a chief justice the Governor-General in Council in the case of the high court at Calcutta, and the local Government in other cases, shall appoint one of the other judges of the same high court to perform the ~~duties~~ duties of chief justice of the court, until some person has been appointed by His Majesty to the office of chief justice of the court and has entered on the discharge of the duties of that office, or until the chief justice has returned from his absence. as the case requires.

(2) On the occurrence of a vacancy in the office of any judge of a high court, and during any absence of any such judge or on the appointment of any such judge to act as chief justice, the Governor-General in Council in the case of the high court at Calcutta, and the local Government in other cases, may appoint a person, with such qualifications as are required in person to be appointed to the High court, to act as a judge of the court; and the person so appointed may sit and perform the duties of a judge of the court, until some person has been appointed by His Majesty to the office of judge of the court, and has entered on the discharge of the duties of the office, or until the absent judge has returned from his absence, or until the Governor-General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting judge.

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JURISDICTION

106. Jurisdiction of high courts: (1) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such power and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdictions, power and authority as are vested in those courts respectively at the commencement of this Act.

³[(1a) The letters patent establishing or vesting jurisdiction, powers or authority in a high court may be amended from time to time by His Majesty by further letters patent.]

(2) The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

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107. Powers of high court with respect to subordinate courts: Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say:—

- (a) call for returns ;
- (b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction ;
- (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ;

1 47 Bom. 742; (1932) Bom. L. R. 1523. 2. This sub-section was inserted by Sch. I of the Government of India (Amendment) Act, 1916. (7 & 6, Geo. 5, ch 37). 3. (1932) Bom. L.R. 1523.

(d) prescribe forms in which books, entries, and accounts shall be kept by the officers of any such courts ; and

(e) settle table of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts ;

¹Provided that such rules, forms and tables shall not be inconsistent with the provisions of any [law] for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in council, and in other cases of the local government.

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108. Exercise of jurisdiction by single judges or division courts : (1) Each high court may by its own rules provide as it thinks fit for the exercise, by one or more judges, or by division courts constituted by two or more judges of the high court, of the original and appellate jurisdiction vested in the court.

(2) The chief justice of each high court shall determine what judge in each case is to sit alone, and what judges of the court whether with or without the chief justice, are to constitute the several division courts.

109. Power of Governor-General in council to alter local limits of jurisdiction of high courts : (1) The Governor-General in Council may by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the high courts and authorise any high court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the high court was established, and also to exercise any such jurisdiction in respect of ²[any British subject for the time being within] any part of India outside British India.

(2) The Governor-General in Council shall transmit to the secretary of State an authentic copy of every order made under this section.

(3) His Majesty may signify, through the Secretary of State in council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor-General notifies that he has received intimation of the disallowance but no act done by any high court before such notification shall be deemed invalid by reason only of such disallowance.

110. Exemption from jurisdiction of high courts : (1) The Governor-

1. 51 Bom. 416 (=29 Bom. L. R. 361). 2. This word was substituted for the word 'Act' by Sch. I of the Government of India [Amendment] Act, 1916, (6 & 7 Geo. 5, ch. 37). 3. These words were substituted for the words "Christian subjects of His Majesty resident in" by *ibid.*

General, each governor, ¹[lieutenant-governor and chief commissioner] and each of the members of ¹[the executive council of the Governor-General or of a governor or lieutenant-governor] ²[and a minister appointed under this Act] shall not—

- (a) be subject to the original jurisdiction of any high court by reason of anything counselled, ordered or done by any of them in his public capacity only : nor
- (b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction; nor
- (c) be subject to the original criminal jurisdiction of any high court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the chief justices and other judges of the several high courts.

111. Written order by Governor-General justification for act in any court in India: The order in writing of the Governor-General in Council for any act shall, in any proceeding, civil or criminal, in any high court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject; but nothing in this section shall exempt the Governor-General, or any member of his executive council or any person acting under their orders, from any proceeding in respect of any such act before any competent court in England.

LAW TO BE ADMINISTERED

112. Law to be administered in case of inheritance and succession : The high court at Calcutta, Madras, and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom, having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

ADDITIONAL HIGH COURTS

113. Power to establish additional high courts: His Majesty may, if he sees fit by letters-patent, establish a high court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another high court, and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act; and where a

1. These words were inserted by *ibid.* 2. These words were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo 5, ch. 101).

high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration.

ADVOCATE-GENERAL

114. Appointment and powers of Advocate-General: (1) His Majesty may by warrant under His Royal Sign Manual, appoint an advocate-general for each of the presidencies of Bengal Madras and Bombay.

(2) The advocate-general for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England.

(3) On the occurrence of a vacancy in the office of advocate-general or during any absence or deputation of an advocate-general, the Governor-General in Council in the case of Bengal, and the local government in other cases, may appoint a person to act as advocate-general; and the person so appointed may exercise powers of an advocate-general until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties, or until the advocate-general has returned from his absence or deputation, as the case may be, or until the Governor-General in Council or the local government, as the case may be, cancels the acting appointment.]

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PART X

ECCLESIASTICAL ESTABLISHMENT

115. [Jurisdiction of Indian Bishops.] Rep. by Sch. I of 17 and 18 Geo. 5, ch. 40.

116. [Power to admit to holy orders.] Rep. by Sch. II of 6 and 7, Geo 5, ch. 37.

117. [Consecration of person resident in India appointed to bishopric.] Rep. by Sch. I of 17 and 18 Geo. 5, ch. 40.

118. [Salaries and allowances of bishops and archdeacons.] Rep. by Sch. I of 17 and 18 Geo. 5, ch. 40.

119. [Payments to representatives of bishops] Rep. by Sch. I of 17 and 18 Geo. 5, ch. 40.

120. [Pensions to bishops.] Rep. by Sch. I of 17 and 18 Geo. 5, ch. 40.

121. [Furlough rules.] Rep. by Sch. I of 17 and 18, Geo. 5, ch. 40.

1. This sub-section was added by Sch. I of the Government of India (Amendment) Act, 1914 (6 & 7 Geo. 5, ch. 37),

122. Establishment of Chaplains of Church of Scotland: (1) Two members of the establishment of Chaplains maintained in each of the presidencies of Bengal, Madras and Bombay must always be ministers of the Church of Scotland, and shall be entitled to have, out of the revenues of India, such salary as is from time to time allotted to the military chaplains in the several presidencies.

(2) The ministers so appointed chaplains must be ordained and inducted by the presbytery of Edinburgh according to the forms and solemnities used in the Church of Scotland and shall be subject to the spiritual and ecclesiastical jurisdiction in all things of the presbytery of Edinburgh, whose judgments shall be subject to dissent, protest and appeal to the Provincial Synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland.

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123. Saving as to grants to Christians: Nothing in this Act shall prevent the Governor-General in Council from granting, with the sanction of the Secretary of State in Council, to any sect, persuasion or community of Christians, not being of the Church of England or Church of Scotland, such sums of money as may be expedient for the purpose of instruction or of the maintenance of places of worship.

PART XI

OFFENCES, PROCEDURE AND PENALTIES

124. Certain acts to be misdemeanours: If any person holding office under the Crown in India does any of the following things that is to say—

(1) **Oppression:** if he oppresses any British subject within his jurisdiction or in the exercise of his authority; or

(2) **Wilful disobedience:** if (except in case of necessity, the burden of proving which shall be on him) he wilfully disobeys, or wilfully omits, forbears or neglects to execute, any orders or instructions of the Secretary of State; or

(3) **Breach of duty:** if he is guilty of any wilful breach of the trust and duty of his office; or

(4) **Trading:** if, being the Governor-General, or a governor, lieutenant-governor or chief commissioner, or a member of the executive council of the Governor-General or of a governor or lieutenant-governor¹ [or being a minister appointed under this Act] or being a person employed or concerned in the collection of revenue or the administration of justice, he is concerned in, or has any dealing or transactions by way of trade or business in any part of India, for the benefit either of himself or of any other person, otherwise than as a shareholder in any joint-stock company or trading corporation; or

1. These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

- (5) **Receiving presents:** if he demands, accepts or receives, by himself or another, in the discharge of his office, any gift, gratuity or reward, pecuniary or otherwise, or any promise of the same, except in accordance with such rules as may be made by the Secretary of State as to the receipt of presents, and except in the case of fees paid or payable to barristers, physicians, surgeons and chaplains in the way of their respective profession,

he shall be guilty of a misdemeanour; and if he is convicted of having demanded, accepted or received any such gift, gratuity or reward, the same, or the full value thereof shall be forfeited to the Crown, and the court may order that the gift, gratuity or reward, or any part thereof, be restored to the person who gave it, or be given to the prosecutor or informer and that the whole or any part of any fine imposed on the offender be paid or given to the prosecutor or informer, as the court may direct :

¹[Provided that notwithstanding anything in this Act, if any member of the Governor-General's Executive Council or any member of any local government was at the time of his appointment concerned or engaged in any trade or business, he may, during the time of his office with the sanction in writing of the Governor General, or in the case of ministers, of the governor of the province, and in any case subject to such general conditions and restrictions as the Governor-General in Council may prescribe, retain his concern or interest in that trade or business, but shall not during that term, take part in the direction or management of that trade or business.]

125. Loans to princes or chiefs : (1) If any European British subject without the previous consent in writing of the Secretary of State in Council or of the Governor-General in Council or of a local government, by himself or another,—

- (a) lends any money or other valuable thing to any prince or chief in India ; or
- (b) is concerned in lending money to, or raising or procuring money for any such prince or chief, or becomes security for the payment of any such money ; or
- (c) lends any money or other valuable thing to any other person for the purpose of being lent to any such prince or chief ; or
- (d) takes, holds, or is concerned in any bond, note or other security granted by any such prince or chief for the repayment of any loan or money hereinbefore referred to,

he shall be guilty of a misdemeanour.

1. This proviso was inserted by Part I of Sch. II of the Government of India Act, 191 (9 & 10 Geo. 5, ch. 101.)

(2) Every bond, note, or security for money, of what kind or nature soever, taken, held or enjoyed, either directly or indirectly for the use and benefit of any European British subject, contrary to the intent of this section, shall be void.

126. Carrying on dangerous correspondence: (1) If any person carries on, mediately or immediately, any illicit correspondence, dangerous to the peace or safety of any part of British India, with any prince, chief, landholder or other person having authority in India, or with the commander, governor or president of any foreign European settlement in India, or any correspondence, contrary to the rules and orders of the Secretary of State or of the Governor-General in Council or a governor in council, he shall be guilty of a misdemeanour; and the Governor-General or governor may issue a warrant for securing and detaining in custody any person suspected of carrying on any such correspondence.

(2) If on examination taken on oath in writing of any credible witness before the Governor-General in Council or the governor in council, there appear reasonable grounds for the charge, the Governor-General or governor may commit the person suspected or accused to safe custody, and shall within a reasonable time, not exceeding five days, cause to be delivered to him a copy of the charge on which he is committed.

(3) The person charged may deliver his defence in writing with a list of such witnesses as he may desire to be examined in support thereof.

(4) The witness in support of the charge and of the defence shall be examined and cross-examined on oath in the presence of the person charged, and thier depositions and examination shall be taken down in writing.

(5) If, notwithstanding the defence, there appear to the Governor-General in Council or governor in council reasonable grounds for the charge and for continuing the confinement, the person charged shall remain in custody until he is brought to trial in India or sent to England for trial.

(6) All such examinations and proceedings, or attested copies thereof under the seal of the high court, shall be sent to the Secretary of State as soon as may be, in order to their being produced in evidence on the trial of the person charged in the event of his being sent for trial to England.

(7) If any such person is to be sent to England, the Governor-General or governor, as the case may be, shall cause him to be so sent at the first convenient opportunity, unless he is disabled by illness from undertaking the voyage, in which case he shall be so sent as soon as his state of health will safely admit thereof.

(8) The examinations and proceedings transmitted in pursuance of this section shall be received as evidence in all courts of law, subject to any just exceptions as to the competency of the witnesses.

127. Prosecution of offences in England: (1) If any person holding office under the Crown in India commits any offence under this Act or any offence against any person within his jurisdiction or subject to his authority, the offence may, without prejudice to any other jurisdictions, be inquired of, heard, tried and determined before His Majesty's High Court of Justice, and be dealt with as if committed in the county of Middlesex.

(2) Every British subject shall be amenable to all courts of justice in the United Kingdom of competent jurisdiction to try offences committed in India for any offence committed within India and outside British India, as if the offence had been committed in British India.

128. Limitation of prosecutions in British India: Every prosecution before a high court in British India in respect of any offence referred to in the last foregoing section must be commenced within six years after the commission of the offence.

129. Penalties: If any person commits any offence referred to in this Act he shall be liable, to such fine or imprisonment or both as the court thinks fit, and shall be liable, at the direction of the court, to be incapable of serving the Crown in India in any office, civil or military; and, if he is convicted in British India by a high court, the court may order that he be sent to Great Britain.

PART XII

SUPPLEMENTAL

1[129A. Provisions as to rules: (1) Where any matter is required to be prescribed or regulated by rules under this Act and no special provision is made as to the authority by whom the rules are to be made, the rules shall be made by the Governor-General in Council, with the sanction of the Secretary of State in Council and shall not be subject to repeal or alteration by the Indian legislature or by any local legislature.

(2) Any rules made under this act may be so framed as to make different provision for different provinces.

(3) Any rules to which sub-section (1) of this section applies shall be laid before both Houses of parliament as soon as may be after they are made, and if an address is presented to His Majesty by either House of Parliament within the next thirty days on which that House has sat after the rules are laid before it praying that the rules or any of them may be annulled, His Majesty in council

1. Section 129A was inserted by Part I of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101)

may annul the rules or any of them and those rules shall thenceforth be void, but without prejudice to the validity of any thing previously done thereunder :

Provided that the Secretary of State may direct that any rules to which this section applies shall be laid in draft before both Houses of Parliament, and in such case the rules shall not be made unless both Houses by resolution approve the draft either without modification or addition, or with modifications and additions to which both Houses agree, but upon such approval being given, the rules may be made in the form in which they have been approved, and such rules on being so made shall be of full force and effect, and shall not require to be further laid before Parliament.]

130. Repeal: ¹[The Acts specified in the Fourth Schedule to this Act are hereby repealed, to the extent mentioned in the third column of that Schedule :

Provided that] this repeal shall not affect :—

- (a) the validity of any law, character, letters patent, Order in Council, warrant, proclamation, notification, rule, resolution, order, regulation, direction or contract made, or form prescribed, or table settled, under any enactment hereby repealed and in force at the commencement of this Act, or
- (b) the validity of any appointment, or any grant or appropriation of money or property made under any enactment hereby repealed, or
- (c) the tenure of office, conditions of service, terms of remuneration or right to pension of any officer appointed before the commencement of this Act.

²[Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any letters patent or other document, to any enactment repealed by this Act, shall for all purposes be construed as references to this Act, or to the corresponding provision thereof.]

³[Any reference in any enactment in force in India, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any letters patent or other document, to any Indian legislative authority, shall for all purposes be construed as references to the corresponding authority constituted by this Act.]

SAVINGS

131. Savings as to certain rights and Powers: (1) Nothing in this Act shall derogate from any rights vested in His Majesty, or any powers of the Secretary of State in Council, in relation to the Government of India.

(2) Nothing in this Act shall affect the power of Parliament to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof.

1. This portion and Sch. IV were repealed by the Statute Law Revision Act, 1927 (17 and 18 Geo. 5, ch. 42). 2. These paragraphs were inserted by Part I of Sch. II of the Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101).

(3) Nothing in this Act, shall affect the power of the ¹[Indian legislature] to repeal or alter any of the provisions mentioned in the Fifth Schedule to this Act, or the validity of any previous exercise of this power.

132. Treaties, contracts and liabilities of East India Company: All treaties made by the East India Company, so far as they are in force at the commencement of this Act, are binding on His Majesty, and all contracts and liabilities incurred by the East India Company may, so far as they are outstanding at the commencement of this Act, be enforced by and against the Secretary of State in Council.

133. Orders of East India Company: All orders, regulations and directions lawfully made or given by the Court of Directors of the East India Company, or by the Commissioners for the affairs of India, are so far as they are in force at the commencement of this Act, deemed to be orders, rules and directions made or given by the Secretary of State under this Act.

134. Definitions: In this Act, unless the context otherwise requires,—

- (1) "Governor-General in Council" means the Governor-General in executive council; (2) "governor in council" means a governor in executive council; (3) "lieutenant-governor in council" means a lieutenant-governor in executive council. ²[(4) "local government" means, in the case of governor's province the governor in council or the governor acting with ministers (as the case may require), and, in the case of a province other than a governor's province, a lieutenant-governor in council, lieutenant-governor or chief commissioner; "local legislative council" includes the legislative council in any governor's province, and any other legislative council constituted in accordance with this Act; "local legislature" means, in the case of a governor's province, the governor and the legislative council of the province, and, in the case of any other province, the lieutenant-governor or chief commissioner in legislative council]; (5) "office" includes place and employment; (6) "province" includes a presidency; and (7) references to rules made under this Act include rules or regulations made under any enactment hereby repealed, until they are altered under this Act.

³[The expressions "official" and "non-official," where used in relation to any person, mean respectively a person who is or is not in the civil or military service of the Crown in India.

Provided that rules under this Act may provide for the holders of such offices as may be specified in the rules not being treated for the purposes of this Act, or any of them, as officials.]

[135. Short title: This act may be cited as the Government of India Act.]

1. These words were substituted for the words "Governor-General in Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101). 2. Paragraph (4) was substituted by *ibid.* 3. This paragraph was inserted by Part I *ibid.* 4. Sec. 135 was substituted by Part II, *ibid.*

SCHEDULES

1 FIRST SCHEDULE

NUMBER OF MEMBERS OF LEGISLATIVE COUNCILS

Legislative Council							Number of Members
Madras	...	...	...	...	...	...	118
Bombay	...	...	...	...	...	...	111
Bengal	...	...	...	...	...	...	125
United Provinces	...	...	...	...	...	...	118
Punjab	...	...	...	...	...	...	83
Bihar and Orissa	...	...	...	...	...	...	98
Central Provinces	...	...	...	...	...	...	70
Assam	...	...	...	...	...	...	53

1 This Schedule was substituted by Part I of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

1 SECOND SCHEDULE

[Rep. by the Statute Law Revision Act, 1927 (17 & 18 Geo. 5, ch. 42)].

OFFICIAL SALARIES, &c.

Officer,	Maximum Annual Salary.
Governor-General of India	Two hundred and fifty six thousand rupees.
Governor of Bengal, Madras, Bombay and the United Provinces.	One hundred and twenty-eight thousand rupees.
Commander-in-Chief of His Majesty's forces in India.	One hundred thousand rupees.
Governor of the Punjab, and Bihar and Orissa	One hundred thousand rupees.
Governor of the Central Provinces	Seventy two thousand rupees.
Governor of Assam	Sixty-six thousand rupees.
Lieutenant Governor	One hundred thousand rupees.
Member of the Governor General's Executive Council (other than the Commander-in-Chief.)	Eighty thousand rupees.
Member of the executive council of the governor of Bengal, Madras, Bombay, and the United Provinces.	Sixty-four thousand rupees.
Member of the executive council of the governor of the Punjab, and Bihar and Orissa.	Sixty thousand rupees.
Member of the executive council of the governor of the Central Provinces:	Forty-eight thousand rupees.
Member of the executive council of the governor of Assam:	Forty-two thousand rupees.

THIRD SCHEDULE.**OFFICES RESERVED TO THE INDIAN CIVIL SERVICE****A.—Offices under the Governor-General in Council**

1. The offices of secretary, joint secretary, and deputy secretary in every department except the Army, Marine, Education, Foreign, Political and Public Works Department: Provided that if the office of secretary or deputy secretary in the Legislative Department is filled from among the members of the Indian Civil Service, then the office of deputy secretary or secretary in that department, as the case may be, need not be so filled.

2. Three offices of Accountants General.

B.—Offices in the provinces which were known in the year 1861 as "Regulation Provinces"

The following offices, namely :—

1. Member of the Board of Revenue.
2. Financial Commissioner.
3. Commissioner of Revenue.
4. Commissioner of Customs.
5. Opium Agent.
6. Secretary in every department except the Public Works or Marine Department.
7. Secretary of the Board of Revenue.
8. District or sessions judge.
9. Additional district or sessions judge.
10. District magistrate.
11. Collector of Revenue or Chief Revenue Officer of a District.

1. This Schedule was substituted by Part II of Sch II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

FIFTH SCHEDULE
PROVISIONS OF THIS ACT WHICH MAY BE REPEALED OR
ALTERED BY THE ²[INDIAN LEGISLATURE]

Section.	Subject.
62	Power to extend limits of presidency towns.
106... ..	Jurisdiction, power and authority of high courts
108 (1)	Exercise of jurisdiction of high court by single judge or division courts.
109... ..	Power for Governor-General in Council to alter local limits of jurisdiction of high courts, etc.
110... ..	Exemption from jurisdiction of high courts.
111... ..	Written order by Governor-General in Council a justification for act in high court.
112... ..	Law to be administered in cases of inheritance, succession, contract and dealing between party and party.
114 (2)	Powers of advocate-general.
124 (1)	Oppression.
124 (4)—so far as it relates to persons employed or concerned in the collection of revenue or the administration of justice.	Trading.
24 (5)—so far as it relates to persons other than the Governor-General, a governor or a member of the Executive Council of the Governor-General or of a governor.	Receiving presents.
125... ..	Loans to princes or chiefs.
126... ..	Carrying on dangerous correspondence.
128... ..	Limitation for prosecutions in British India.
129... ..	Penalties.

1. This schedule was substituted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5 Ch. 37) 2. These words were substituted for the words "Governor-General in Legislative Council" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, ch. 101).

**THE CONSTITUTIONAL LAW
OF
INDIA AND ENGLAND**

PART II

The Constitutional Law of England

THE CONSTITUTIONAL LAW OF ENGLAND

CHAPTER I

WHAT IS CONSTITUTIONAL LAW?

1. **Social Sciences:** Political Science is one of the Social Sciences, which are divided into; (i) *Sociology*, or the science dealing with forms of human associations; (ii) *Economics*, or the science dealing with the material well-being of man. (iii) *Ethics*, or the science of human conduct, as it ought to be; (iv) *Social Psychology*, or the science of the social behaviour of man; and (v) *Political Science*, or the science which deals with society as organised under a supreme authority for the maintenance of orderly progress.

2. **Close Affinity:** These various social sciences are closely allied to one another. In fact, political science is in a sense a branch of sociology, for a study of the structure and government of political communities can never be useful unless it has for its basis the broader sociological aspect. The aim of sociology includes the aim of political science. It is to find some central conception in the light of which both what is uniform and what is variable in social mentality and institutions would become intelligible. It is also dependent to some extent on economics, but not identical with it. Material existence and ideal value are not necessarily identical. Again, in studying social and political institutions, we cannot ignore ethical values and ideals which more often than not inspire human conduct. Every act of human will inspired by these forces, in a sense, destroys the complete sequence of cause and effect between the material and the social world. A personal pique of a Gladstone or a gastric trouble of a Napoleon have been known to change the destinies of nations and alter the course of history. Politics has also a psychological basis. To use the words of G.D.H. Cole, "all political theories and all practical judgments about politics are bound to rest on assumptions, or dogmas, or doctrines about the nature of men, their instincts, desires, teachability, strength of will, patience, suggestibility, initiativeness and a host of other characteristics innate or acquired."

3. **Function of Political Science :** However connected political science may be with other social sciences, it is strictly concerned with society as a *politically* organised unit. It deals with the state, its nature, its origin, its purposes and functions. It studies and classifies the institutions which the state builds up, and the constitution which it evolves to make its existence secure. The problem of political science is to decide the nature of *Sovereignty* and to trace where, in the ultimate analysis, it rests and how it is distributed in the mechanism of government. There is the *external* sovereignty, *i. e.*, with reference to other states; there is the *internal* sovereignty, *i. e.*, with reference to the individuals and associations within the territory of the state.

There is again (i) the *titular* sovereign, *e. g.*, the King of England; (ii) the *legal* sovereign, *i. e.*, the person or institution in which sovereignty resides according to the law recognised by the Courts. It has the right to make or unmake any law, which no other person or body can override. The "King in Parliament" would answer this description in Great Britain. And (iii) the *ultimate* sovereign, *i. e.*, the body of persons in whom sovereignty finally resides, *e. g.*, the electorate in Great Britain. These terms have to be considered in every case in the light of political theory advocated, but the extreme legal doctrine of sovereignty gives some idea of the mysterious nature of this attribute of the state. As MacIver puts it: "Sovereign power is absolute and perpetual, independent with regard to other states, so that it may make peace or war at will; unlimited within its own, so that it need never ask in anything the consent of any superior or equal." As things are, however, this description is scarcely applicable to the sovereignty in modern states. Modern political experiments have so sub-divided and distributed sovereignty that very often it becomes impossible to trace it in any one person or institution, or any set of them, within a given territory.

4. Main Divisions : For the purposes of studying political science as manifested in the organisation of a particular state, we must deal with it from four different view-points, *viz* , (i) *historical*, (ii) *descriptive*, (iii) *theoretical* and (iv) *applied*. It is difficult to give a single definition of *state*, for every political theorist defines the state in his own characteristic way. Prof. Hetherington defines the *state* as "the institution or a set of institutions, which, in order to secure certain elementary common purposes and conditions of life, unites under a single authority the inhabitants of a clearly marked territorial area." President Wilson's definition is yet more appropriate. "A state is a people organised for law within a definite territory." The main purpose of this treatise is to study the constitutional law of the state known as the United Kingdom (comprising the countries of England, Wales, Scotland and a part of Ireland, excluding the Irish Free State), and to that end it is requisite to know the evolution of the institutions of that state and the present working of those institutions. The treatment followed, therefore, in subsequent chapters is to trace the evolution of the constitution of the United Kingdom, and the functions appropriated by the various institutions forming the said constitution to manifest the common will of the State.

5. Meaning of "Constitution": The term "Constitution" is used in two widely differing senses. It may mean a written instrument of *fundamental* law which outlines the governmental system, defines the powers of the Governing bodies, enumerates and guarantees the rights of citizens and lays down other principles and rules to be observed in carrying on the affairs of the state. It may also denote the whole body of laws, customs and precedents, either partially or not at all committed to writing which determine the organization and working of government.

6. Unwritten: For the purpose of studying the Constitutional Law of England, one has to look at the English constitution in the second sense of the term. That constitution is not contained in any single document or in a group of documents; a portion of it is not in written form at all. Besides, as we have already seen, unlike the constitutions of other countries, it was not adopted at any one time; it is a product of fifteen centuries of political growth, and much of it was never formally adopted at all. Prof. Dicey calls it "unwritten" in this sense. The fundamental principles of the constitution are, however, found in written form in such authorised documents as the Magna Carta, the Petition of Right and the Bill of Rights. The United Kingdom is the only state in the world with an unwritten constitution; all other states have a written constitution, *i.e.*, a constitution embodied in one single document.

7. Flexible not rigid: Besides being unwritten, the English constitution is flexible and not rigid like that of some other countries. In the latter, a sharp distinction is drawn between the powers of constitution-framing and amendment and the powers of ordinary legislation. For instance, in the United States of America, the congress, the central legislative body, which is empowered to legislate on matters concerning the country, cannot amend the constitution unless the change is supported by an affirmative vote of the legislatures of three-fourths of the States. In England, the powers are not so divided. Parliament is the sovereign body possessing both these powers in equal degree. It can enact, repeal or revise any measure affecting the fundamental principles of the governmental system, that is, the constitution, with the same ease and procedure with which it can enact, repeal or revise any other ordinary measure. It can do and undo anything except that it cannot turn a man into a woman, or a woman into a man. *The keystone of the law of the constitution is the omnipotence of Parliament in the spheres both of constitution-making and ordinary legislation.* In other words, to test whether the constitution of a State is flexible or rigid, we have to find out whether the process of passing ordinary laws is the same as for making or altering constituent laws. If it is the same, the constitution is flexible; if the process is different, the constitution is rigid. Besides England various other states like Italy, New Zealand and Finland, possess flexible constitutions.

8. Unitary, not federal: The third important characteristic of the English constitution is that it is *unitary* and not *federal* in form. In a federal state the political sovereign distributes the powers of government among certain agencies, central and divisional, through the medium of constitutional provisions. These central and divisional agencies are not responsible for making these constitutional provisions, and have no power individually to alter or rescind the same. Thus, that distribution is made by an authority superior to both central and divisional governments. The British constitution, is unitary because all power under it is concentrated in a single integral government centering at

London. It creates counties, boroughs and other local bodies according to its own convenience, endows them with such powers as it chooses to give and is free to alter them both in their organization and power, or to abolish them altogether at any time. Various other states, besides the United Kingdom, have unitary constitutions. The most notable among them are France, Italy, the Irish Free State, New Zealand and Jugo-Slavia. On the other hand, the noteworthy federal states are the United States of America, Switzerland, Australia, Canada, the German Republic, and others. The main characteristics of the constitutions of these several unitary and federal states are discussed in subsequent chapters.

The other distinguishing characteristics of the constitutions of different states of the World are: (1) Whether the Constitution provides for a parliamentary executive, *e. g.*, in Switzerland. (2) Whether there is adult suffrage, as in England, or manhood suffrage, as in Italy. The two tables taken from C. F. Strong's "modern Political Constitutions" and given at the end of this Chapter, will show at a glance the kinds of constitutions possessed by the various states of the World, and will make clear their distinguishing characteristics.

9. Constitutional Law : Definition : All those rules which directly or indirectly-affect the distribution or exercise of Sovereign Power in the state, are comprised in the term "Constitutional Law." It includes rules which define the members of the Sovereign Power or regulate the relation of such members to one another and to the community at large or determine the mode in which they exercise their authority. The rules are of two kinds; (i) Laws and (ii) Conventions.

10. Laws : The laws of the constitution are those rules which are recognized and enforced by the Courts of Law. They may be either *written* or *unwritten*. The written laws include (a) treaties and other international agreements; (b) solemn engagements entered into from time to time by conflicting political forces, *e. g.*, the Magna Carta, the Petition of Right or the Bill of Rights; (c) those Statutes of Parliament which add to or modify governmental powers or procedure, *e. g.*, the Habeas Corpus Act (1679) or the Reform Act (1832); (d) judicial decisions establishing constitutional principles; and (e) opinions of the Law officers of the Crown on questions put to them by Ministers or Government Departments. These exist solely in written form. There is, on the other hand, a vast body of legal precept and usage, known as the *Common Law*, which has acquired binding and immutable character, although it has not been reduced to writing except in the form of judicial decisions. The 'rules' or laws proper are termed the Law of the Constitution.

Illustrations : (a) "The King can do no wrong" is a maxim which belongs to the first division of the Law of the Constitution. The King may

1. See also Ch. VII, Part I.

even kill anybody and there is no procedure known to the Law of England, under which any court can try and punish him for murder. (b) But the King has no power to dispense with the obligation to obey any law. No person can commit murder and plead successfully that he was authorised to do so by the King or by any superior officer. In short, no person can be excused for doing any act in obedience to his superior's orders, even if that superior be the King, if the act is not justifiable by law. Similarly, (c) the rights of jurymen, (d) the privileges of the Houses of Parliament and of their members, (e) the right to personal liberty, (f) the right of public meeting, (g) the rights and duties of the police, (h) the order of succession to the throne, (i) the rights and duties of electors and various other matters, come within the category of laws.

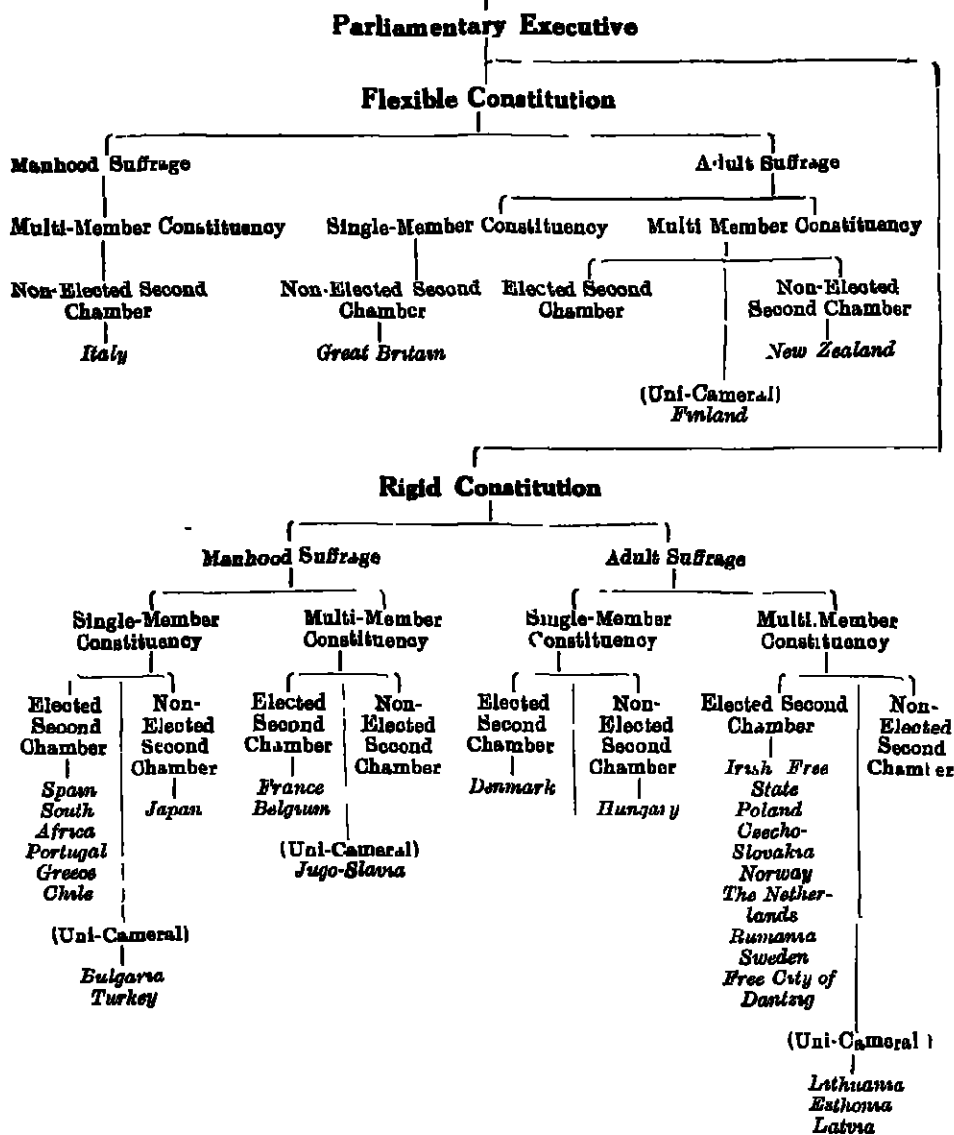
11. (ii) Conventions : The Conventions of the Constitution are those understandings, habits, usages or practices which are not enforceable by the Courts, although they may relate to matters of the most vital importance. These conventions regulate a large proportion of the actual relations and operations of public authorities, and are as important as any of the laws. They are not in written form and do not appear in the Statute Book or any instrument which can be made the basis of an action in a Court of Law.

Illustrations : (a) 'The King cannot veto a measure passed by both Houses of Parliament.' If he does so the legality of his action cannot be questioned in a Court of Law, but the consequences might be serious. (b) 'Ministers resign if and when they cease to command the confidence of the House of Commons.' (c) 'In cases of difference of opinion between the two Houses, the House of Lords must ultimately give way.' (d) 'Money Bills do not originate in the House of Lords.' (e) 'Parliament must be convened annually.' (f) 'A bill must be read three times before it is finally voted upon.' These and many other rules of a similar nature fall within the category of conventions and no court will interfere even if they are violated. Some of these rules are almost inviolable because of the tremendous force of public opinion behind them; others are not considered so very strong. But all of them have one common characteristic, that if violated no Court of Law will enforce obedience to any of them, and as such they are distinguished from the law of the constitution, which can always be so enforced.

12. Three guiding principles : It will be evident from this that the true Constitutional Law consists of legal rules, such as those determining the legal position of the Crown or the legal rights of his Ministers or the constitution of both Houses of Parliament. It is to be collected from various sources from which the ordinary law of England is collected. For the study of this Constitutional Law there are three main principles of guidance. These principles are: (1) The Legal Sovereignty, *i. e.*, the unlimited power of legislation of Parliament; (2) the Supremacy or Rule of Ordinary Law, and (3) the Relation and Interdependence of the Law of the Constitution and its Conventions.

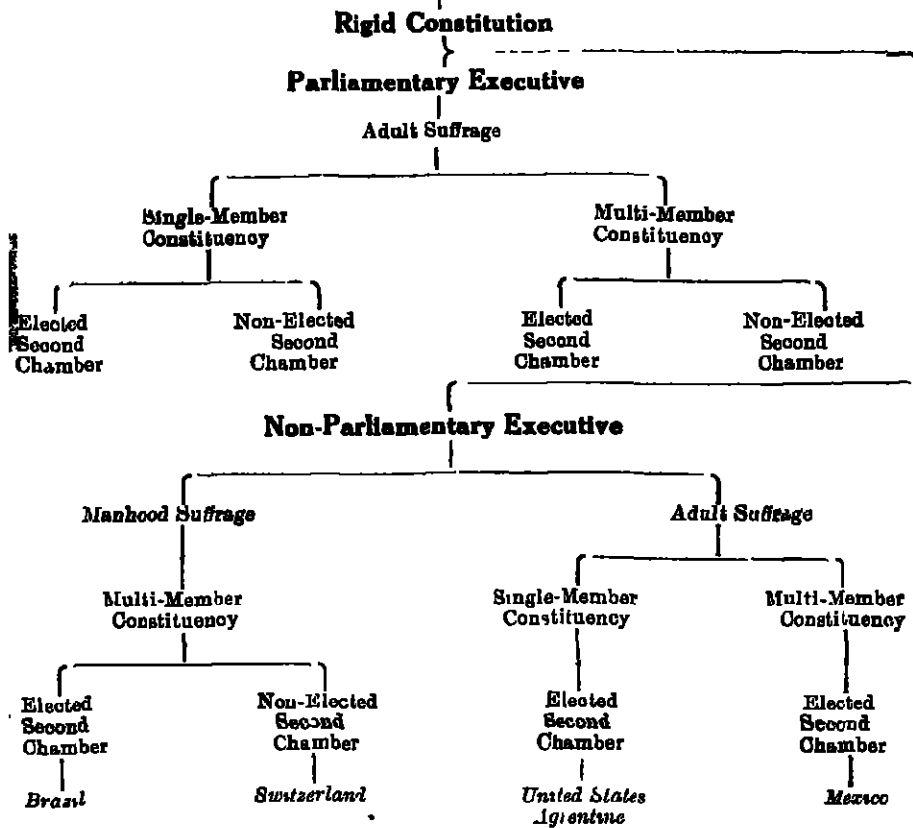
1. For further details see chapter X.

TABLE A*
UNITARY STATES



* From C. F. Strong's "Modern Political Constitutions", p. 354.

TABLE B*
FEDERAL STATES



* From C. F. Strong's "Modern Political Constitutions", p. 355.

CHAPTER II

DEVELOPMENT OF THE CONSTITUTION

13. Introductory : As stated in the first chapter of this part, for the proper study of the Constitutional Law of England (*i. e.*, of the United Kingdom) it is necessary to follow the events that led to the development of the present system of government in England.

England has achieved great distinction in solving for the World the problem of constitutional government, that is, of government with authority, but limited by law, controlled by public opinion and respecting personal right and freedom. Her political development has been orderly, continuous and prolonged. And, although, governmental organization of the country has undergone many serious changes in recent years, her political institutions are none the less still pre eminently rooted in the past.

The development of the present system of constitutional government of England can be divided into six periods :

14. First Period: Before the Norman conquest, 1066 : The first period of Anglo-Saxon settlement and rule extends from the fifth century to the Norman Conquest in 1066. Some of the institutions, chiefly Kingship, the Witenagemot and the local government divisions, which originated during this period, were of prime importance in later times.

15. Kingship: Monarchy in England is an indigenous, not an imported institution. The earlier kings were various chieftains of victorious warbands ruling over their tribal kingdoms. Eventually, in the ninth century, the whole of the occupied portion of the country was brought under the control of a single sovereign. The King was primarily a war-leader. His office was elective and of limited power. He was chosen by the wise-men sitting in Council, who may pass over an immediate heir in favour of a remoter but abler relative. As lawgiver his "dooms" were framed, in consultation with the wise-men. He held no court and had little to do with the administration of justice. He had no control whatever over local affairs.

16. Witenagemot : The composition of this body was determined by the King and varied from time to time. The persons most likely to be summoned were the members of the Royal family, the greater ecclesiastics, the King's thegns, the ealdormen, other leading officers of the State and of the King's household and the principle men who held land directly of the King. Popularly elected representatives were not then included. It was summoned three or four times a year, and acting with the King, it made laws, levied taxes, negotiated treaties, appointed ealdormen and bishops and sometimes heard cases not disposed off in the Courts of the *shire* and the *hundred*. As it could elect and depose the King, he was obliged to recognize a certain responsibility to it. The

monarchy was thus limited from its very inception and the Council was the supreme authority in the land.

17. Local government divisions: There were several units of local government. (i) The smallest of these was the *township* which consisted usually of a village surrounded by arable lands, meadows and woodlands. The *town-moot* was a primary assembly of the freemen of the village. Presided over by a *reeve* it administered the township's affairs. A variation of the township was a *borough* with similar arrangements for government though larger in population and greater in political independence. (ii) A group of townships formed a *hundred*. It was presided over by a *hundredman*, who was ordinarily elected but sometimes appointed by the landowner or prelate to whom the land of the hundred belonged. He was assisted by the *hundred-moot*, a council of twelve or more freemen. The principle of representation was introduced here; for, to the meetings of this body came the reeve, the parish priest and four 'best men' from each township and borough included in the hundred. It met once a month. Its principle function was to adjudicate upon civil, criminal and ecclesiastical cases. (iii) The next unit was the *shire*, presided over by an *ealdorman*, who was appointed by the King and the Witan. There was also the *shire-reeve* or *sheriff*, who, though at first subordinate to the *ealdorman*, overshadowed him later on. He was a representative of the Crown sent to assume charge of the Royal lands, collect revenues and receive fines imposed by the Courts. Each shire had a *moot*, a gathering of the freemen of the shire. All freemen were entitled to attend either in person or by representative. It met twice a year and decided disputes over land and tried suits for which a hearing could not be obtained in the Court of the hundred.

18. Second period: 1066-1216: This period extends from the Conquest by William in 1066 to the death of King John in 1216. It witnessed the growth of the King's power and the building of a great centralised administrative system.

19. Powerful Monarchy: In Anglo-Saxon days monarchy was weak. The powerful and statesmanlike Conqueror skilfully manouvered the results of the invasion so as to make the King a real master of the country, and England became a united and centralised monarchy, of the most absolute type. The two main departments of government, *i.e.*, justice and finance were skilfully organised. The department of justice comprised the *curia* presided over by the *chancellor*; that of finance, the *exchequer* was headed by the *Treasurer*. The principal officials of the two departments formed a single body of men. The Justices of the Curia held Court throughout the realm. The sheriffs came up twice a year to render an account of the sums due from the shire to the Exchequer. The central and local governments were thus knit together. From this Curia several of the departments of the present-day administration have sprung up.

20. Commune Concilium: *The commune Concilium* or the Common or Great Council was associated with the King from the first. It was summoned thrice a year and consisted of the great ecclesiastics, the principal officers of the State and such tenants-in-chief of the King as were individually summoned. This gathering of magnates was consulted by the King, like the Witenagemot, on all important questions of legislation, finance and public policy. Out of this Council evolved, in time, Parliament, the Cabinet and the Courts of Law. Henry II (1154-89) added greatly to the importance of this institution by habitual presentation to it of leading questions of state. He also put on a permanent basis the provincial visitations of the Royal justices and extended the principle of the jury in the local administration of justice and finance.

21. Magna Carta (1215): The system which was in general beneficent and bearable in the hands of able Kings became intolerable in the hands of weak or vicious rulers. Under King John, a long accumulation of grievances led the barons into open rebellion. The King was compelled to grant them the famous body of liberties known as the Great Charter. The document is of the utmost importance in the history of the English Constitution. It furnished a remarkable summary of the fundamental principles of English government in so far as they had ripened by the 13th century. Its main object was not a new constitution but good government in conformity with the old one. It aimed at the redress of present and practical grievances. Although, its provisions related primarily to the privileges of the barons, it also contained clauses that affected all classes of society. It laid down important regulations concerning government and law, notably that whenever the King should propose the assessment of "*scutages*" or of unusual financial "*aids*", he should take the advice of the Great Council. There are other clauses also calculated to guarantee impartial justice and personal freedom to the individual. The principal idea running through the entire instrument is that of limitation upon the autocratic power of the King. In short, the Great Charter laid down two fundamental principles, *viz.*, first, that there exist in the State certain laws so necessarily at the basis of the political organization at the time that the King or the Government must obey them, and secondly, that if the Government refuses to obey these laws, the nation has the right to force it to do so even to the point of overthrowing the Government and putting another in its place.

22. Third Period: Formation of Parliament: The Magna Carta thus began the age-long contest between the ruler and the ruled. It ended only when the people established their right to be in all respects their own master. The leading role in this conflict on the side of the people was played by the great institution which did not then exist, *viz.*, the Parliament. The creation of Parliament came about through the enlargement of the Great Council of Norman days by the introduction of representatives of various classes in the community, chiefly the merchants and small landowners, who had no standing there in

feudal days. The principle of representation was no new thing in the 13th century; it was doing good service in the sphere of local justice and finance. It was found expedient to adopt this principle into the domain of national affairs, to facilitate taxation. This adoption gradually converted the feudal assembly into a national Parliament.

King John took the first step in this direction in 1213 under stress of fiscal and political difficulties and addressed writs to sheriffs commanding that four "discreet knights" from every county be sent to the Council at Oxford. Henry III needing money for his Wars similarly sent for "two knights" from each county, in 1254. The supplies were, however, refused and the contest resulted in a Civil War, between the King and the barons. After the King's defeat at Lewes in 1264, Simon de Montfort, leader of the barons, summoned a Parliament including four knights from each shire. In 1255, he again summoned a Parliament which included also two burgesses from each town. The representatives of the towns were thus brought into political co-operation with the barons, clergy and the knights for the first time.

23. 'Model Parliament': Edward I's 'Model Parliament' fixed the type for all time to come. The King summoned to this Assembly the two archbishops, all bishops, greater abbots, more important earls and barons, two knights from each shire, two citizens from each city and two burgesses from each borough. In the assembly were thus brought together all the leading classes of the community, viz., the nobility, the clergy and the commons and from this time forth Parliament became an established institution. All these three classes sat and transacted business separately for a long time. Practical interests, however, led to a different arrangement. The lesser clergy continually tried to throw off their obligation of membership. The greater clergy and the greater barons developed sufficient interests in common to be amalgamated in one body. Lesser barons similarly found their interests identical with those of the country freeholders represented by the knights of the shire and the burgesses. Gradually, the assembly divided into two groups, one forming the House of Lords, the other the House of Commons. By the end of Edward III's reign (1377) this two-house organization became complete; the Upper House practically perpetuated the old feudal Council, while the Lower House was composed of representatives of non-feudal classes.

24. Growth of Power: Although its meetings were irregular and infrequent, Parliament steadily gained in power. It asserted and maintained authority in the two most important domains of finance and legislation. (1) In finance, it established the two principles that (i) the right to levy taxes of every sort lay within its hands, and that (ii) the Crown should impose no direct tax without its assent, nor any indirect tax that could not be justified under the customs recognised in Magna Carta. For the first time in 1395 appeared the formula employed to this day in making Parliamentary grants, viz.,

"by the Commons, with the advice and assent of the Lords Spiritual and Temporal." In 1407, Henry IV gave formal assent to the principle that money grants should be initiated in the Commons, be agreed to by the Lords and only thereafter be reported to the King. (2) In the domain of *legislation*, also, the power was gradually usurped by Parliament. Originally it was not conceived of as a law-making body. The Old Council was entitled to advise the Crown in legislative matters and Parliament followed the same course for some time. At first, the laws were made "by the King with the *assent* of the magnates at the *request* of the Commons." The Commons were thus recognised as petitioners for new laws; it was for the King and his councillors to decide whether the legislation was required, and if so, what form it should assume. This system, naturally did not work to the satisfaction of the Commons. Even when the legislation asked for was promised, their intent was often frustrated, as both form and context were determined arbitrarily by the King and his Council. They, therefore, fought for a right that the Statute in its final form should be identical with their petition. In 1414, Henry V granted that "from henceforth nothing be enacted to the petitions of the Commons that be contrary to their asking, whereby they should be bound without their assent." The rule being however, frequently violated, a change of procedure was brought about late in the reign of Henry VII (1422-61), under which drafted bills began to be introduced in either House. The formula then adopted "by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and the Commons in the present Parliament assembled, and by the authority of the same" continues to be employed even to day, unless the Statute is passed under the terms of the Parliament Act of 1911, in which case mention of the Lords is omitted.

25. The Privy Council and the Law Courts: Side by side with the development of Parliament, there emerged the Privy Council, and the four principal Courts of Law, also, from the Great Council. Those members of the Council, who were immediately attached to the Court or to the administrative system, acquired a status different from that of their colleagues. The Great Council and likewise Parliament met irregularly and infrequently, but the service of the Court and the business of government must go on continuously. To look after these affairs, there grew up a body from the Council which later on became independent and came to be designated as the Permanent Council. Its composition varied from time to time. To facilitate its work trained lawyers, expert financiers and men of special aptitudes, who were more often mere commoners, were introduced into it. Its powers were enormous, as it was required to give attention to administrative, judicial and financial matters. The mass of business steadily grew and various committees split off from this body to each of which was assigned a particular branch of administrative or judicial business. The four great Courts of Law arose out of these Commi-

tees: (i) The Court of *Exchequer* exercised jurisdiction over fiscal causes which directly concerned the Crown. (ii) The Court of *Common pleas* dealt with civil cases between subject and subject. (iii) The Court of *King's Bench* handled cases for which no other provision was made. (iv) The Court of *Chancery* exercised equitable jurisdiction. All these were co-ordinate courts and an appeal from them lay to the King-in-Council. As time went on this Permanent Council became so enlarged in membership that it ceased to be a working body in the 15th century and a smaller and more compact administrative group was detached therefrom which came to be called the "Privy Council." In the 17th and 18th centuries, the Privy Council also became too large for practical use and the important functionaries detached therefrom under the name of "Cabinet" became the working executive of the realm.

26. Fourth Period: Parliamentary Development: We have already seen Parliament grow in power in the middle of the 15th century in the domains of finance and legislation. During the Tudor Period (1485-1603), it appeared as if Parliament was losing ground. The struggle, however, was not between strong monarchy and Parliamentary government. The nation had to choose between strong monarchy and baronial anarchy and it certainly preferred the former. A strong executive was necessary to the national unity, and in the face of the dangers which threatened the country at home and abroad, the Sovereign was allowed a free hand. The Tudor monarchy was essentially a national monarchy; it was popular with the people and was supported by the influential classes. Parliament continued to exercise a certain control over legislation and taxation but its further development was arrested for the time being. The functions of government were carried on mainly in and through the Privy Council, which practically ruled the realm in all important matters whether administrative, judicial, or legislative. It supervised administration; it issued Ordinances in the name of the Crown and exercised extensive and despotic jurisdiction, both original and appellate, as a High Court. It also wielded control over taxation.

Parliament was obliged to give its sanction to all these. It became almost a tool in the hands of powerful sovereigns. Whenever unpopular measures had to be enacted or large supplies of money obtained the Tudor kings or queens came to Parliament. Henry VIII bullied his Parliaments shamelessly. Elizabeth attained the same end by cajolery, flattery or deceit. They employed various devices to evade the limitations theoretically imposed by the Parliamentary authority. They issued "Proclamations", having the authority of law and affecting the most sacred liberties of the people. They could also suspend or dispense with the laws in individual cases or in times of crisis generally. The range covered by these prerogatives was broad and undefined, as the Sovereign was free from Parliamentary control owing to his relative independence in

financial matters. There were numerous sources of revenue over which Parliament had as yet no control.

The spirit of independence was, however, gradually growing. The composition of the two Houses was not yet clearly defined. The House of Lords was only a small body; only those lords, spiritual and temporal, who were individually summoned by the King could attend and their number was indeterminate. Eventually, the principle became fixed that a man once summoned must always be summoned and so also his eldest son after him. The membership during the 14th century fluctuated around 150; it became smaller in the 15th century. During the Tudor period, the principal development was the substitution of temporal for spiritual preponderance. New hereditary peers were created on one hand, while the number of the clergy decreased on the other, owing to the closing of the monasteries.

The House of Commons was a body of about 362 members during the reign of Henry VIII. It consisted of 90 knights of the shire representing the counties and a shifting quota of representatives of cities and boroughs. Members were elected by the body of freeholders present at a County Court. But the franchise was limited by a Statute of 1429 to freeholders resident in the county and holding land of the yearly rental value of 40 shillings. The electoral system was, however, not uniform and the same state of affairs continued upto 1832. The number of members, however, was increased from time to time. During the Tudor period, according to one calculation, 166 new members were added to the Lower House. This was due to the growing prosperity of the country, which added new constituencies from time to time and also to the habitual reliance of the Tudors upon the commercial and industrial classes.

Parliament also developed in the matter of frequency and duration of its sessions. Before Henry VIII, the life of a Parliament, as a rule, was confined to a single session, and was often brought together for some specific piece of business. During the Tudor period, Parliament gained a recognised position in the political system of the nation. Its life was not confined to a single session, nor to a single piece of business. Besides, both Houses started to keep their journals and committees and various other features of modern Parliamentary procedure had their beginning during this period.

27. Fifth Period: Struggle for Supremacy: During the Stuart period (1603-1688), the struggle for supremacy between the King and Parliament again came to a head. James I propounded his theory of the "Divine Right of Kings" that "the Sovereign rules by the will of God. As to dispute what God may do is blasphemy, so is it sedition in a subject to dispute what a King may do in the height of his power." The Tudor kings held exactly the same views but they were not tactless like the Stuarts to proclaim it from housetops. Besides, the conditions had changed. There was no longer any need for a strong monarchy. All danger of feudal reaction had been removed and foreign

invasion was no more to be feared. Parliament had also grown strong in the meanwhile as an organ of public will. All these factors combined to contribute to the success of Parliament in establishing the constitutional rights and privileges of the people as against the absolute power of the King. It reiterated more than once, boldly and frankly, the fundamental principles, *viz.*, (i) that the electors must have free choice in electing their representatives; (ii) that these representatives must be free from restraint and imprisonment; (iii) that they may speak and debate freely on all matters concerning the state, and (iv) that the King and both Houses make but one political body.

The Stuart doctrine also ran counter to the common law principle that the King while subject to no man, was always subject to Law, and that Law had its proper source in the people, as represented in Parliament. Throughout the struggle Parliament contended for the recognition of this doctrine. It also laid ever-increasing emphasis on the rights of man as individuals. In the *Petition of Right* (1628), which marked the end of the first stage in Parliament's progress to victory, these rights were recognised by the King, *viz.*, (i) exemption from certain forms of taxes except when imposed by an Act of Parliament, (ii) the right to know, through the writ of *Habeas Corpus*, the cause of imprisonment or detention by Royal Order, and (iii) exemption from the quartering of soldiers and from the processes of Martial Law. These rights together with various additions and modifications were often asserted and tested in the Courts and came to be known under the formula "life, liberty and property." Parliament again tried by the *Grand Remonstrance* in 1641 to impose constitutional restriction upon the Crown, but it did not succeed in its efforts and the Civil War broke out which cost Charles I his head.

During the period of the Commonwealth (1649-54), an attempt was made to establish manhood suffrage but met with no success. In 1653, a Written Constitution, first of its kind in Europe, known as the "Instrument of Government" was adopted and put into operation. It set up as executive power a *life-Protector* assisted by a Council of 13 to 21 members, and as the legislative organ a one House Parliament of 460 members elected by all citizens possessing property of the value of £300/. In 1657, "the other House" was added. But the English people were monarchist at heart and the restoration of monarchy was inevitable. Soon after the death of Cromwell, Charles II was restored to his father's throne (1660).

The restoration of the Stuarts really meant a compromise in the struggle started during the reign of James I, between a strong monarchy and the supremacy of Parliament. The compromise meant that while the form and appearance remained with the King, the reality remained with Parliament. The result of the struggle may be formulated thus: "Sovereignty resides in the King in his Parliament. The King is in theory sovereign, but his sovereignty can only be declared and exercised in Parliament." The King gave up the power to deter-

mine by his individual will the policy of state, but the surrender was disguised by an appearance of power and for a long time by the exercise of very substantial powers and the permanent possession of important rights and influence. Thus Parliament came to control the actual government in fact rather than in form, indirectly, not directly and an actual republic was concealed under the ceremonial and theoretical forms of a continued monarchy. Charles II was tactful enough to realise his real position and recognize the limits beyond which he could not safely go. James II was a man of different temper and owing to his arbitrary resumption of the ancient prerogative had to flee the country.

† Past experience with the Stuarts had made the people wiser and they put into writing a considerable portion of their constitution as it then existed. This writing known as the *Declaration of Right* (1689) was formally accepted by William of Orange and Mary before they were installed on the throne. This document was made a part of the law of the land, under the name of *Bill of Rights*, by an Act of Parliament, during the same year. It is not a constitution in the modern sense of the term. It does not affirm the sovereignty of the people or of Parliament. It does not fully enumerate the rights of the individual citizen. It concerns itself only with the practical difficulties experienced during the past two generations to which the Stuarts had laid claims and also guaranteed certain fundamental rights including those of petition, freedom of elections, and freedom of speech for members of Parliament. It also affirmed the necessity of frequent meetings of Parliament and excluded Roman Catholics from the throne.

The Bill of Rights, as one writer puts it, marks in a very important sense the culmination of English constitutional development. All that followed was but the detailed application of the principles established in the 17th century and the elaboration of the machinery of Parliamentary control. *The Sovereignty of the nation, the supremacy of law and the omnipotence of Parliament were never again seriously questioned.* And the Kingship continued as an useful institution, dependent not upon the divine right, but upon the consent of the nation as expressed through Parliament.

28. Sixth Period : Changes since 1689 : We will now proceed to see how the fundamental principles of the constitution established in the 17th century were applied in practice in the 18th and the 19th centuries. The three main principles, viz., (i) laws could be made only by "the King in Parliament", (ii) taxes could be levied in the same manner, and (iii) the liberty of the individual should be protected, established in 1689, are the same upon which the government is operated at the present day. From 1689 began an era of change in which the governmental system was expanded, carried in new directions and continuously readapted to fresh and changing conditions. These changes were made gradually, cautiously and very often even unconsciously. The most important of these changes may be noted here.

29. Decline in King's power : The most important of these changes is the transfer of power from the hands of the King to those of Parliament. Parliament acting through Ministers began to exercise during this period complete and continuous control over the affairs of the nation. The process was very gradual. William III had an innate love of power, which he never attempted to conceal. Anne was equally attached to the interests of strong monarchy. However, during the reigns of the first two Georges (1714-1760), most of the powers hitherto retained by the King slipped finally into the grasp of the Ministers and of Parliament. During the next 60 years (1760-1820), under George III, the monarchical idea revived. He was determined to recover the prestige and authority that his predecessors had lost and exercised so much influence over the affairs of the State that the Commons were alarmed. They gave expression to their apprehension in several resolutions asserting unequivocally that "the influence of the Crown has increased, is increasing and ought to be diminished." Providence intervened in the shape of the King's insanity and all that was regained was again lost. Under George IV (1810-20), even the popularity of the Sovereign reached its lowest point. William IV (1830-37) regained popularity but not power. It was Queen Victoria (1837-1901) who rehabilitated the monarchy in the respect and affections of the people, and the position thus recovered has been maintained intact by Edward VII and George V. Instead of power, however, the Sovereign wields influence in the actual conduct of public affairs. That influence, though merely a shadow of the authority the King once possessed, is by no means unimportant. It is largely personal than legal and is more frequently asserted in the domain of foreign affairs. It is, however, powerless against the will of the nation as expressed through Parliament.

30. Increase in the power of the House of Commons : With the power of the King, the power of the House of Lords also gradually declined. The centre of gravity shifted from the Upper to the Lower House. While Robert Walpole remained Prime Minister (1721-42), the Commons rapidly rose to preponderance, mainly because of the power of the purse wielded by them. This, however, did not mean the triumph of popular government. The House was composed of representatives elected on a very restricted franchise or appointed by either close corporations or magnates. Beginning with the Reforms Act of 1832 and culminating in the Representation of the People (Equal Franchise) Act of 1928, a series of memorable Statutes were passed to democratise the House. These Statutes extended the franchise to groups of people hitherto politically powerless, reapportioned seats to fairly distribute political influence among the voters and laid down rules for the conduct of elections and other necessary operations.

31. Rise of Cabinet system : The third change wrought during this period was the rise of the Cabinet system of government, the most remarkable

feature of the English Constitution. We have already seen before how the Privy or Permanent Council was detached from the Great Council of Norman days. In time the Privy Council also became too unwieldy and hence "unfit for the secrecy and dispatch that are necessary in many great affairs." The King therefore, got into the habit of drawing round himself a few Ministers who had his confidence and were also influential with Parliament. They gave collective advice to the King and introduced or supported legislation that the Government desired. They were at first chosen without considering the wishes of Parliament; they were responsible only to the King himself. Parliament naturally got alarmed. No one imagined at the time that the system can be utilized to bring the King under still further restraint. The institution was looked upon as an agency of intrigue in the interest of the Crown and the word "Cabinet" (derived from the habit of the King in receiving the Ministers in a small room or cabinet in the palace) first came into use as a term of reproach. The institution, however, met a serious need and was ultimately indispensable. Some arrangement was required whereby the legislature can directly supervise and control all lines of government policy and executive action. The Cabinet system of government with the principle of ministerial responsibility to Parliament met this requirement thoroughly.

The introduction of this principle of *mass responsibility* to Parliament was, as usual, gradual and unconscious. William III selected his Ministers without any consideration of the strength of various parties in the *House of Commons*. He, however, failed in his attempt to govern with a mixed Ministry of *Whigs* and *Tories* and in 1695 drew his advisers exclusively from the Whigs. From this time, it gradually became an axiom that the King's advisers or Ministers must be chosen from that party alone which had a majority in the Lower House. During the days of George I and George II, the principle was continually worked out in practice. In 1742, when Robert Walpole, the first Prime Minister lost support of the majority in the House, he promptly, and as a matter of course, resigned. Parliament had now begun to understand how the Cabinet system enabled it to enforce the collective and individual responsibility of Ministers, and willingly dropped the old and almost obsolete remedies of impeachment and the Bill of Attainder. Although, the Cabinet system was not fully understood in all its implications and bearings till the middle of the 19th century, certain conceptions were definitely fixed by the end of the 18th century, viz., that the Cabinet consisted of members of Parliament of either House, holding the same political views, chosen from the party having a majority in the commons, prosecuting a concerted policy, under a common responsibility to be signified by collective resignation, if they lost support of the majority, and acknowledging common allegiance to one Chief Minister.

32. Rise of Party System: The fourth important development of this period was the rise of political parties and party system, which play an impor-

tant role in the government of the country. In the present-day sense of the term, a party means a group of members of parliament, having a distinctive theory of government, a reasonably stable and continuous organisation and a purpose to control legislation by means of a majority in the *House of Commons*. The first political parties that answer this description were the *Whigs* and the *Tories*. The Whigs stood for toleration in religion and Parliamentary supremacy in government; the Tories for Anglicanism and Royal prerogative. As we have seen, William III tried to govern with the help of a mixed Ministry of Whigs and Tories and failed. He had, therefore, to fall back upon the support of the Whigs alone. In 1702, when the Whigs were turned out of office, the Tories came in power. They in their turn gave place to their rivals on the accession of George I. It can be easily seen that between the rise of the cabinet system and the growth of government by parties, there is a close and inevitable connection. As has been pointed out, the Cabinet was to be composed of men belonging to or in sympathy with the party having a majority in the House of Commons and all of them must resign in a body as soon as that majority proved hostile to them.

CHAPTER III

PARLIAMENT

33. The British Parliament, which originated in the 13th century, became definitely organised into two Houses in the 14th century, wrested a control of the nation's affairs from the King in the 17th century and underwent a thoroughgoing democratisation in the 19th and the 20th centuries, is the oldest and the most powerful of modern legislative bodies. It is rightly called the "Mother of Parliaments." The jurisdiction which it exercises includes the whole domain of government; its power, both in law and in fact, is absolute and unrestricted. It is the only and the sufficient depository of the authority of the nation, and therefore, within the sphere of law, irresponsible and omnipotent. In order, therefore, to understand how the United Kingdom of Great Britain and Ireland is governed, we must, study the constitution of this powerful body. It is composed of the "three Estates of the Realm," as they are sometimes called, viz, the Crown, the House of Lords and the House of Commons. Each of these component parts has its distinct rights and privileges and plays an important role in the government of the country.

I. THE CROWN

34. Powers in theory: The Government of the United Kingdom is, in theory, an absolute monarchy; in form, a limited or constitutional monarchy and in actual working, a democratic republic. The Sovereign stands at the head of that system. In theory, he is the supreme executive, the source of all

law, the fountain of justice and honour, the commander-in-chief of the army and the navy and such other things. All land is held of him directly or indirectly. Parliament exists by his will and right to vote for a member depends upon his grant

The Sovereign, in reality, possessed these and many other privileges for centuries. To-day, they have little or no political bearing. He is the supreme executive only in name; he has very little to do with the composition of Parliament. On the other hand, the powers of the Crown are extensive. The Crown and the Sovereign were once identical; we will presently see how they became separate and the place each of them fills in the governmental system of the country.

35. Succession to the throne: Since 1689, succession to the throne is dependant exclusively upon the will of the nation as expressed through Parliament. The Act of Settlement (1701) regulated that succession and the present sovereign George V, the eighth of the Hanoverian dynasty, occupies the throne under the provisions of that Act. It is within the power of Parliament to repeal that Act or abolish kingship altogether.

36. Rule of Descent: Religion: The established rule of descent is that the eldest son succeeds when a vacancy occurs. If he is not alive, his issue, male or female, succeeds and failing that the succession devolves upon the second son or his issue. No Catholic or any person marrying a Catholic can inherit. If a Sovereign embraces Catholic religion, his subjects would be absolved from allegiance. He is required to take an oath on his accession that "he is a faithful Protestant."

37. Age: The age of majority of the Sovereign is eighteen. There is no provision in the constitution for such contingencies as minority or incapacity; they are dealt with when they arise. In such cases a Regent is appointed by Parliament. A Regency Act of 1811 defines the Regent's powers and lays down safeguards for the interests of both the Sovereign and the nation.

38. Privileges: The Sovereign enjoys various privileges. There is no legal process whereby his conduct can be called to account in any Court of law. On the other hand, he can own property and dispose it off like any other citizen. At one time, he held vast property which formed his principal source of revenue. This property is now administered under the direction of Parliament and in lieu of the income derived therefrom a fixed annual subsidy is given to the King for the support of the Royal household. This amount is determined afresh at the beginning of each reign. Before 1688, this amount included also the expenses for the civil government and for the upkeep of the army in times of peace. The King was free to use as much of the general fund for his personal purposes as he liked and the balance went to swell his purse. After 1688, the King gave up all rights of personal control over the

remaining income of the State. He had still to meet out of the annual sum allocated to him the expenses of the civil service and of pensions and out of the habit of enumerating items chargeable on the King's fund arose the name *Civil List*, which is now applied to the subsidy itself. The said subsidy was gradually relieved of all the other charges and is now given and employed only for the support of the dignity of the King and his household. The present sovereign, George V gets annually as Civil List a sum of £ 470 000, which was fixed at his accession in 1910.

39. Distinction between 'Crown' and 'Sovereign': On the social and ceremonial side, the Sovereign looks an important and imposing figure, but his control over public affairs, such as legislation, finance, appointments, foreign affairs, etc., is purely incidental. As has already been shown, at one time his power in these great fields was absolute. Gradually, this power was transferred into the hands of Parliament and the Sovereign is now reduced to the position of one who reigns but does not govern. The powers of the Crown are still numerous and extensive but the Crown is no longer the King. The Crown, meaning thereby the supreme executive agency in the Government, was once the King alone, but now it is the Ministers and their subordinates, with the King as a sort of fifth wheel to the wagon. An illustration or two will make the distinction quite clear. When we say that the Crown appoints all public officers, we mean that the King advised by his Ministers makes these appointments. In practice, the Ministers make the appointments. And, as we know, these Ministers are selected by the King only in form; in reality, by Parliament. Again, executive acts are performed in the name of the Crown, though the King may be either ignorant of or even opposed to them. The fundamental principles of the constitution are : (1) that no public act involving the exercise of discretion be performed by the Crown except through the agency of a Minister and (2) that for every act performed in the name of the Crown, the Minister, who performs it, shall be responsible to Parliament.

40. The real importance of Sovereign: It need not be supposed, however, that Kingship in England is a superfluous and obsolete institution. As Bagehot puts it, the Sovereign has three rights, the right to be consulted, the right to encourage and the right to warn. A really capable Sovereign can exercise great influence upon the course of public affairs by the tactful exercise of these rights. The ancient relation between the King and his Ministers is merely reversed; now it is the King who advises and the Ministry that arrives at decisions. Cabinet meetings at which important decisions are arrived at are generally preceded by a conference between the King and the Premier and the subject is completely thrashed out there. It is a well known fact that Queen Victoria, Edward VII and George V have exercised a good deal of influence on the course of public affairs and the first two have averted wars more than once, by their personal influence in foreign affairs.

41. Prerogative : The powers exercised by the Crown originate either from custom and common law or from Parliamentary grant, *i.e.*, by Statute. Those powers of the Crown that exist by virtue of custom or common law are known as *prerogative*, which is defined by Halsbury as "that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of its common law, but out of its ordinary course, and comprehends all the special dignities, liberties, privileges, power and Royalties allowed by common law to the Crown of England." It is created by common law for the benefit of the people and cannot be exercised to their prejudice. The earlier monarchs were able to commit illegalities in the name of prerogative because its limits and extent are vague at common law. But as early as 1610, it was settled that "the King has no prerogative except which the law of the land allows him and he cannot change any common law, statute law or custom by proclamation."¹ The Courts have therefore jurisdiction to enquire into the existence or extent of any alleged prerogative.

42. Sources: All prerogatives belong to one or the other of the three sources: (1) The *executive powers* possessed by the King as *tribal chieftain*. From this source are derived the powers and authorities of the Crown entrusted to him by common law as the supreme executive officer in the State. It includes all the power the executive can legitimately exercise without the authority of an Act of Parliament. (2) The *privileges* enjoyed by the King as *feudal lord* and ultimate landowner. The King enjoys special rights of property not only as regards Royal lands but also such rights as that of *escheat*, custody over infants and others. (3) The attributes of special pre-eminence and dignity with which kingship has been clothed. From this source follow the attributes of absolute perfection² or of perpetuity³ as well as legal privileges and immunities from proceedings by or against the Crown.

43. Restrictions on the Prerogative : As many of the powers, now enjoyed by the Crown, represent original prerogative modified by Parliamentary enactment, it is difficult to determine whether a particular power exists by virtue of a prerogative or by virtue of a Statute. This much is certain, that the prerogative of the Crown may be defined, restricted or extended by an Act of Parliament. Dicey therefore defines it as "the residue of arbitrary authority which at any given time is legally left in the hands of the Crown." It is the *residue* because much of it has been curtailed, limited or restrained by Statutes. These powers have been reduced in three ways, *viz.*, (i) by agreements between the King and the people, *e.g.*, Magna Carta; (ii) by prohibitive legislation, *e.g.*, putting an end to suspending and dispensing powers; and (iii) by disuse, *e.g.*, the power of the Crown to add to the member.

1. Case of Proclamation: 8 Jac. 1, 1610.

2. "King can do no wrong."

3. "King never dies."

ship of the House of Lords. The powers are also augmented by custom and more particularly by legislation, *e.g.*, when a system of old age pensions is established and fresh duties of administration are imposed upon the King, or he is given powers of subordinate legislation by the device of "Statutory Orders" by virtue of a Statute. These powers fall into three groups: *executive, legislative and judicial*.

As an *executive* head of the realm, the Crown appoints and removes public officers, with a few exceptions, executes all laws, spend public money voted by Parliament, grants charters, creates peers, coins money, commands the army and the navy and represents the nation in foreign affairs.

In the field of *legislation* the Crown has suffered very great loss. In theory, the King acts in collaboration with the two Houses. Parliament transacts business during the pleasure of the Crown. Houses are summoned and prorogued and the Lower House can be dissolved by and in the name of the Crown and no Parliamentary act can be valid without the Crown's consent. In practice, he has lost his once unlimited power of law-making; he cannot issue Proclamations and Ordinances and apart from Parliament he has no inherent legislative power except in Crown Colonies. He is obliged to approve and accept every law passed by Parliament. No doubt, Orders in Council are still promulgated in his name, but some of them are administrative regulations and not laws; others known as "Statutory Orders" are promulgated by virtue of the authority expressly granted by Parliament. The point is that in issuing them the Crown acts by *delegated and not inherent* authority. They are merely species of subordinate legislation.

In the *judicial* field, also, the Crown's prerogative has suffered a good deal. In theory, as Blackstone puts it, the King is "not only the chief but properly the sole magistrate of the nation; all others acting by Commission from and in due subordination to him." In practice, he does not exercise any judicial function personally. All the superior judges are appointed by him, on the advice of the Ministry. They hold office for life and cannot be removed except for misbehaviour and then only upon an address of both Houses of Parliament. All prosecutions for offences are conducted in the name of the Sovereign and, in theory, he can pardon all offenders, either before or after conviction. This prerogative can be exercised only on the advice of the Secretary of State for Home Affairs and is subject to various restrictions. It is generally exercised in the following cases: (a) where fresh evidence tending to exculpate the accused is discovered after trial; (b) where evidence relied upon at the trial was untrustworthy and resulted in a miscarriage of justice; (c) where the judge himself prefers a recommendation against the finding of the jury; or (d) in the case of political offences, after the danger has subsided. It cannot be exercised in the case (a) of an impeachment, or (b) of committing a person to prison out of the realm in contravention of the provi-

sions of the Habeas Corpus Act, or (c) where pardon would cause injury to an innocent person.

44. Who exercises them? Although, in theory, the Crown possesses these powers, they are, in fact, except in the case of purely personal prerogative, exercised by the Ministers or the Cabinet in the name of the Crown. These Ministers, although selected by the King in name, are in reality appointed by the House of Commons. The King's choice in the selection of his Ministers is limited to the party that is in majority in the Commons, as only those Ministers, who enjoy the confidence of that House, can continue in office for any length of time. These Ministers are responsible to Parliament for all acts done by them in the name of the Crown and in the exercise of his prerogative. Thus, in practice, the Commons have drawn into their control all the existing powers of the Sovereign. Had it not been so, England instead of being the land of liberty, as it is, would have groaned under the worst form of despotic rule.

2. THE HOUSE OF LORDS

45. Composition: The second Estate of the Realm composing Parliament is the House of Lords. It is the oldest, the largest and the more purely hereditary second chamber among contemporary Parliamentary bodies. Its descent can be traced straight from the Great Council of the Norman period or even from the Witenagemot of the Anglo Saxon times. That body was composed originally of the nobility and the clergy, both greater and lesser. Gradually, the lesser clergy ceased to attend and the lesser nobles found it to their advantage to cast in their lot with the knights of the shire and the burgesses and combined with them to form the House of Commons. It consists of about 750 members at present, and is composed of the following elements:—

46. (i) Hereditary Lords of Parliament: These are peers of the United Kingdom. They include (a) 5 Princes of the Blood Royal, (b) 21 Dukes (c) 29 Marquesses, (d) 58 Viscounts (e) 122 Earls, and (f) 406 Barons. (1) These various kinds of peers differ from one another only in respect of their order of precedence. A hereditary peer is created by Letters Patent signed by the King followed by a writ of summons to take the seat in the House of Lords. A peerage descends to the eldest son and to the eldest son of the eldest son, and so on as a general rule. Women may be created Peeresses either by Royal grant, or in some cases by descent. But they are not allowed to sit in the House of Lords. Technically, peers are created by the King but in reality their creation is controlled by the Cabinet and mainly by the Premier. The object may be either to honour men of distinction in various professions or to change the political complexion of the Upper Chamber. This power to create peers is unlimited and was freely and frequently exercised in the past.

47. (ii) Non-Hereditary Lords of Parliament: These are 16 peers of Scotland and 28 peers of Ireland, representing respectively the hereditary

peers of both these countries. The former are elected for each Parliament; the latter are elected for life. Unlike the Scottish peers, Irish peers if not elected to the House of Lords may stand for election to the House of Commons, although they cannot represent the Irish constituencies. While members of the Lower House, however, they cannot be elected to the Upper House, nor can they participate in the choice of representative peers.

48. (iii) Life Lords: These include (a) 26 Lords Spiritual, *i. e.*, 2 Archbishops and 24 Bishops, (b) 6 Lords of Appeal-in-Ordinary, who must be barristers of 15 years' standing or must have held some high judicial office. They are appointed by the Crown, receive a salary of £6,000 per annum and are removeable like other judges on a joint address by both Houses. Their dignity is not inheritable. They do not cease to be either peers of the realm or members of the House of Lords, even if they resign their office. While they hold the office of Lords of Appeal-in-Ordinary, it is their duty to take part in the judicial proceedings of the House. All these Life-Lords are entitled to sit and vote in the House for life.

49. Privileges: The House of Lords enjoys various privileges, most of which are similar to those enjoyed by the Commons. The privileges are: (a) Freedom from arrest except in cases of treason, felony and breach of peace. (b) Freedom of speech. (c) The right to regulate its own constitution. (d) Every individual member has a right of access to the Crown. The members of the House of Commons can do so only through the Speaker. (e) They have a right to commit for contempt, like the Commons, but the imprisonment does not terminate, as in the case of the Commons, with the prorogation of Parliament. (f) They are exempted from service as jurors; not so the Commons. (g) Their greatest privilege is the exercise of judicial functions: (i) as a Court of first instance to try peers and peeresses for treason and felony, to try impeachments (now obsolete) by the Commons and to try disputed peerage claims; and (ii) as a Court of Appeal to act as the final Court in Great Britain and Ireland.

50. Functions: The House of Lords exercises two kinds of functions: (1) Legislative and (2) Judicial. (1) *As a legislative assembly*, it is, in theory, an equal of the House of Commons, but politically, its authority is much inferior to that of the latter. Its consent is necessary to every piece of legislation, but it does not and cannot withhold such consent, when the Commons decide some matter emphatically and with the apparent approval of the nation. In this domain, the function that this House exercises is that of cautious, and very often, conservative revision. When there is some doubt as to the opinion of the nation, it can stand firmly against the Lower House. After the Parliament Act of 1911, its legislative power has suffered a great decline; money bills, *i. e.*, bills dealing with taxation cannot be introduced in the Upper House, and consent to other public bills can only be withheld for a time. The Lord Chan-

cellor is the Speaker of the House. (2) *Its judicial functions* are exercised, as stated above in two different capacities; (a) as a Court of First Instance and (b) as the Supreme Court of Appeal. (a) *As a Court of First Instance*, (i) it tries members of the Peerage charged for treason, felony or misprision, (i.e., for failing to give information as to the commission of treason or felony or concealing the offender). For the trial of such cases a member of the House is appointed to preside over the court, to which the offender is summoned. The president so appointed is called the Lord High Steward. If no such appointment is made, the Lord Chancellor presides; all other members excepting the Bishops are entitled to attend the Court and vote. (ii) The trial by *impeachment* by the House of Commons before the House of Lords has now become obsolete. (iii) The trial by a Bill of Attainder is also rare. (iv) When a person having an Irish domicile seeks a divorce, the case is heard by the House, as it cannot be obtained through the ordinary Courts. The trial in such cases is, as in (iii), by means of a bill introduced in the House, and is, in reality, a legislative process. (v) When a peerage or office of honour is claimed or (vi) an election is disputed, in the case of one of the representative peers of Scotland or Ireland, the "Committee of Privileges" decides the matter. (vii) When any person is guilty of breach of privileges or contempt of the House, he is summoned before and tried and punished by the House, to either fine or imprisonment. (b) *As the Supreme Court of Appeal*, it acts as the final Court to hear appeals from the Courts of the United Kingdom. At the time of the hearing of such appeals, at least three members of the House, who are either Lords of Appeal in Ordinary or such peers, who have held high judicial office, must be present. The Lord Chancellor, who is one of them, presides *ex-officio*.

51. The Lord Chancellor : The Lord Chancellor, also known as the Lord High Chancellor is appointed by the Sovereign and holds office during His Majesty's pleasure. Usually a person recommended by the Premier, who has held or holds the office of Attorney or Solicitor-General, is appointed. He receives a salary of £ 10,000 and on his retirement or removal from office, the Sovereign may grant to him an annuity not exceeding £ 5,000, to continue during his natural life. His duties fall into three divisions, viz., political, administrative and judicial. (i) *Politically*, he is a member of the Cabinet, the Speaker of the House of Lords, and the formal medium of communication between the Sovereign and Parliament. (ii) His *Chief administrative* function is to keep the Great Seal, which is to be affixed to important documents. (iii) As the head of the judicial administration, he is responsible for important appointments to judicial offices. He is one of the judges of the Supreme Court and a member and president of the High Court of Justice. He is also the president of the Chancery Division and the Court of Appeal.

52. Reform : For nearly a century, the reform of the House of Lords

1. Halsbury : Vol. VI, paras 832-854, (Hallsham Edition).

has been one of the greatest issues of British politics. Prior to the Reforms of the 19th century, the House of Commons was hardly more representative of the people than was the House of Lords. Both were equally controlled by the landed aristocracy and hence continued to be equal partners in the field of legislation. After 1832, however, the House of Commons gradually became more and more representative of the mass of the nation, and by 1867, it was converted into a true organ of democracy. The executive was also brought under public control by the development of the Cabinet system. But the House of Lords underwent no corresponding transformation, and still remains an inherently conservative body, standing for interests that are not of the nation at large.

53. Various Plans: In order to remove this political anomaly, the question of reform came in the forefront. Various plans were suggested relating either to its composition or to its powers and functions or both. Frequent attempts between 1869 and 1888 were made to reform its composition, by means of legislation, by dropping out the spiritual members and substituting specially designated members in place of hereditary peers. These attempts, however, failed, and the issue remained in the background until 1906. During that year the Liberal party came in power and the Conservative element in the Upper House began to show a disposition to block the Liberal measures on educational reform and other important matters. The controversy between the two Houses assumed a very serious character and the Commons adopted a resolution declaring that in order to give effect to the will of the people as expressed by elected representatives, the Lower House ought to be in a position to pass any measure into law within the life of a single Parliament, notwithstanding adverse action taken by the Lords. This resolution put the House of Lords on the defensive and in 1908 they appointed a Committee of their body presided over by Lord Rosebery to report a scheme of reform. This Committee recommended that elective element be introduced in the Upper House, but the scheme failed to meet the Liberal demand.

54. Parliament Act, 1911: The issue came to a head in 1909 when the Lords refused to pass the Finance Bill. This act contravened the long accepted principle of the absolute and final authority of the popular branch in matters of finance. It raised in acute form the question of the actual power of the Upper House over money bills and precipitated a crisis in the relation of the two. The Commons passed a resolution that "the action of the House of Lords in refusing to pass into law the provision made by the House of Commons for the finances of the year is a breach of the constitution and usurpation of the privileges of the Commons." As a result of this controversy a bill was introduced defining a money bill and the same bill also limited the duration of a Parliament to a maximum period of five years. The House of Lords tried to impede and amend the bill by counter proposals and an appeal

was made to the electorate. As a result of the general election the Liberals secured a majority of 127 in the Lower House. The bill was reintroduced in the Commons without alteration and passed untouched in its essentials. At the same time, a resolution embodying the programme of reconstruction of the House on an elective basis was introduced in the Lords. They were, however, obliged to drop it. The Parliament Bill passed by the Commons came up for consideration and the Lords passed it with an amendment, "excluding from its operation legislation affecting the constitution and other matters of great gravity." The Commons were not prepared to have this loophole and insisted that the bill should be passed as a whole. Confronted with the alarming prospect of wholesale swamping,¹ the Lords had to pass the bill, which became the Parliament Act, 1911, after receiving the Royal assent. That Act robbed the Upper House practically of all effective power in the matter of legislation. In the case of bills certified by the Speaker to be "Money-bills"² they have in effect absolutely no power now; in the case of other public bills they can only exercise a suspensive veto and delay its passing into an Act for a period of little more than two years.

55. Further Reform: The Parliament Act (1911) promised in its preamble further legislation to define both the composition and powers of the House of Lords on a popular instead of an hereditary basis. Though until very recently no further attempts at legislation are made in this respect, discussion on the subject has gone steadily forward and various solutions have been offered. A Committee with Lord Bryce as Chairman was appointed in 1917. As to functions, this Committee agreed that the Second Chamber ought not to have equal powers with and should not aim at becoming a rival of the House of Commons. In particular, it ought not to have the power of making and overturning Ministries or to enjoy equal rights in dealing with finance. As to composition, the Committee agreed that (1) no one set of political opinion should have a marked and permanent predominance; (2) it should be so made up as to aim at ascertaining the mind and views of the nation as a whole and should recognise the responsibilities to the people as a whole; and (3) persons of experience in various walks of public life, who have no physical vigour requisite for a career in the Commons and persons who are not strong partisans, should be included in it.

56. Various modes of making up the Upper House which would meet with these requirements were duly considered, and a plan was ultimately

1 The device, hitherto resorted to by the Liberals, was to advise the King to create sufficient number of life-peers to give them a majority in the Upper Chamber. The alarming prospect that the Ministry in power might resort to this device, brought the Lords to their senses.

2. The certificate of the Speaker is conclusive and cannot be questioned in a Court of Law.

3. A bill for the reform of the Upper House was introduced in the House of Lords by Lord Salisbury on 19th December, 1933. (For further particulars, see para 60).

recommended. The plan was this: the total membership to be fixed at 327: 246 of these to be elected by the members of the Lower House grouped in 13 regional divisions; the Commons from each division electing the *quota* in the Upper Chamber to which their area is entitled and the remaining 81 to be chosen from the whole body of the peers by a joint committee of two Houses. All these members should be elected for a twelve year term and one-third of their members should retire every four years. Besides, not more than one-third of the 246 members should be elected by any single House of Commons, meaning thereby that the system should be put into operation by degrees.

57. Another scheme was introduced in the House about the middle of 1929 by Lord Cane, which revived the question of reforms. The object of the scheme was to strengthen the Upper House as against the House of Commons. Naturally the Commons were definitely opposed to the scheme and even the Conservative members did not withhold hostile criticism. In December 1929, Lord Clarendon brought a motion in the House which gave the scheme a new complexion. The chief idea underlying his proposal was greater co-operation between the two Houses making for more efficient and less dilatory discharge of Parliamentary work. It was proposed to limit the number of members and "to make suitable provision for an elective representation of the peerage and for such other representation or nomination as would ensure for each political party a fair position in the House." To this end it was suggested that 150 peers be chosen by the general body of peers; another 150 peers to be nominated by the Crown for the duration of a Parliament, these being in proportion to the parties in the House of Commons; and the Crown to have a further right to create a limited number of life-peers. The Parliament Act, 1911, as is apparent, is left untouched and the one object of the reforms would seem to be to enable the House of Lords to perform its constitutional duties with greater efficiency and despatch.

58. It was accepted on all hands that the question of these reforms will come again soon into the field of practical politics. A hereditary House of Lords cannot be perpetual in a free country. At the same time, it cannot be denied that the House as at present constituted contains a number of able and eminent men, that on many occasions it has imposed a wholesome check upon the popular House and that sometimes it has interpreted the will of the nation more correctly than the Commons. The most reasonable plan of reform, therefore, seems to be not a total reconstitution but (1) the adoption of the principle that a hereditary peerage shall not itself entitle the possessor to sit, (2) the admission of representatives selected by a whole body of peers and (3) the introduction of men eminent in various walks of life. The House so constituted may incline to conservatism but their opposition will be less unyielding and less irresponsible than hitherto and with its powers restricted by the Parliament Act (1911), such an alteration will meet all reasonable demands.

59. One more aspect of the problem may also be noticed. It was suggested that members of the Upper House be chosen to represent special groups of interests, including the great professions, *e. g.*, the universities, the learned societies, the chambers of commerce, the trade-unions, the bankers, the doctors and the like. A body constituted on these lines will be respectable, capable and vigorous. Some thinkers are disposed to question whether such an Upper Chamber will not claim equality of right and power with the popular House? Experience shows, however, that in the long run an Upper Chamber, no matter how it is constituted, cannot maintain a parity of power and influence with the Lower House under a system of responsible government. As is proved by France, a Second Chamber, although it occupies a subordinate position, has a legitimate and useful place in the Cabinet system of government. Its uses are to compel delay and deliberation, to serve as an organ of revision and to be a means for securing representation of interests that is not feasible in a chamber composed of members elected directly by the people. The object of such a chamber is not mere obstruction, but instead serious-minded criticism, deliberation and revision with a view to the general welfare. With this object in view, if the House of Lords is wisely reconstructed, there is no reason why its usefulness should not increase rather than diminish, in future.

60. As a result of all these discussions and particularly to counteract the danger of the abolition of the House of Lords by the Socialists, in case they come in power, Lord Salisbury has introduced a Bill for the reform of the House, on 19th December, 1933. Sir Stafford Cripps, a Labour M. P. for Bristol (East), recently indulged in a threat that he and his group of Socialist 'intellectuals' would seek to establish a 'dictatorship' of the Lower House, by abolishing the Second Chamber. It is with a view to neutralise any such possible contingency that Lord Salisbury, backed up by many other Conservative Peers, has introduced the Bill in question. It puts forward a scheme, calculated in the opinion of its sponsor, to make the Upper House constitutionally immune from Socialistic attack. With that object in view, the Bill proposes the reduction of the hereditary principle by limiting the membership to a total of about 320, instead of 700, which may include about 150 hereditary peers, 150 Lords of Parliament chosen outside the peerage, the Royal Peers, Law Lords and a few ecclesiastics. It also proposes to provide a Joint Committee of both Houses with the Speaker as Chairman for the certification of money bills, instead of the Speaker alone. Further, it provides that if a measure is rejected by the House of Lords three times by an absolute majority of the whole House (not merely of those present), the final decision be referred to the next ensuing House of Commons, whose decision would be conclusive.

It will be apparent from this that the Bill does not aim at repealing the Parliament Act of 1911. As Lord Salisbury put it, the bill recognises certain constitutional principles, *viz*, that power over finance belongs to the Lower

House and the final authority is the people; but under the power of the House of Commons in finance, other legislation might be passed, and such legislation might not be the deliberate judgment of the people, but only of a passing majority. In order that the Upper House may prove an efficient check on such legislation, this bill is introduced. There is a good deal of opposition to the bill amongst the Peers, and it remains to be seen in what shape it will finally be put on the Statute Book.

61. Seats for Peeresses : Side by side with this problem of reconstruction, a minor question, that of allowing the peeresses-in-their-own-right to sit in the House of Lords, had come in forefront. Ever since the question of woman suffrage began to agitate the public mind, this question also cropped up and various attempts have been made from time to time to compel the House of Lords to accept the principle. The Conservative element, which is predominant in the House, has successfully thwarted all such attempts so far. The last attempt was made some time back (on 16th July, 1930) by Lord Astor by means of a resolution. The Lords, as was expected of them, turned down this resolution by a narrow majority (53 to 49). This issue will not, however, be of any importance, if the elective principle is adopted in reconstructing the House.

3. THE HOUSE OF COMMONS

62. Parliament means the Commons: It can safely be asserted that Parliament means for all practical purposes the House of Commons. When we say a Minister consults Parliament, he consults the House of Commons. When King is said to dissolve Parliament, he dissolves the House of Commons. And a new Parliament means simply the newly elected House of Commons.

63. Constitution : This omnipotent body is the chief depository of power and the prime organ of popular will. It consists of 615 members, of whom 492 sit for the English constituencies, 36 for the Welsh, 74 for the Scottish and 13 for Ulster. Fifteen of these members are elected by special arrangements to represent the principal universities; the rest of them are elected, in county and borough constituencies, under the Suffrage Law which gives voting power to all adult citizens, male and female,¹ of the age of 21 years. A person can be registered a voter if he or she possesses any of the following four qualifications, viz., (1) residence for a period of six months; (2) occupation of business

1. Women first became eligible to sit in the House of Commons in 1918. Early in that year, the Representation of the People Act was passed, which enfranchised six million women. That Act said nothing about Women being eligible for election. Consequently, the Qualification of Women Act was passed in November 1918. It fixes no age limit. At the elections of the following month, Countess de Markievicz was the first and only woman to be elected a member. Being a Sinn Féiner, however, she did not take her seat as a protest against not granting independence to Ireland. The first woman, who actually served as a member, was Lady Asker, who, as a Unionist candidate, defeated her Liberal and Labour rivals in a bye-election on November 15, 1919.

premises of an annual value of not less than £ 12; (3) the husband or wife of the person entitled to be registered in respect of such business premises; and (4) possession of a university degree. Any British subject of either sex, who is of age, is qualified for election by any constituency. There are exceptions to this rule, such as, peers, clergy, bankrupts, aliens, lunatics, holders of office, government contractors and persons convicted of treason, felony and corrupt practices. Once elected, a member cannot resign, a relic of old days when representatives were unwilling to serve. The only way to retire from the House before a general election is to accept some public office. He will then be *ipso facto* disqualified to sit under the Place Act of 1707. The members are elected by a secret ballot for a term of five years and they are paid an allowance of £ 400 per annum. The party in majority occupies seats on the right of the Speaker, including the Cabinet, who occupy the front bench called the *Treasury Bench*; while the party in minority, known as the *Opposition*, occupies seats on the left of the Speaker, the leaders thereof occupying the front bench.

64. The Speaker: On the opening day of a new Parliament, the Commons elect one from amongst them as the Speaker of their House, at the instance of the Lord Chancellor. He acts as the Chairman, maintains order in the House, rules on points of order, names members guilty of disorder, signs Warrants of Committal for contempt and has a casting vote. He belongs to no party after his election as Speaker. His salary is £ 5,000 per annum.

65. Etiquette: The etiquette to be observed in debates is that no member should drag in the King's name to influence the House, that no reference should be made either to any matter *sub-judice* or to any debate in the House of Lords, that members should not be referred to by name, that no personal or offensive remarks be made, that business should not be obstructed, that seditious and treasonable language should not be used and that speeches should not be read out. Various other similar rules govern the etiquette of the House.

66. Privileges: Privilege is to Parliament what prerogative is to the Crown. These privileges are of two kinds: (i) some of them are specially demanded of the Crown by the Speaker at the opening of each Parliament and granted as a matter of course; (ii) others are not so demanded by the Speaker, but they are nevertheless important and are enjoyed by the House.

(i) Those *demanded* by the Speaker are: (a) *Freedom from arrest*. This privilege extends during, and for forty days before and after, a session of Parliament, except in case of treason, felony, breach of the peace, seditious libel or other indictable offences and contempt of Court. When a member is so arrested the House is informed through the Speaker of the crime by a letter. (b) *Freedom of Speech*. (c) *Right of access to the Crown* through the Speaker. It is a collective right, not an individual privilege. (d) *Right of*

most favourable construction to be put by the Crown upon the proceedings of the House.

(ii) Those not demanded by the Speaker are: (a) Right to regulate its own constitution. This includes the right to determine questions as to the legal qualifications of its members and the right to exclude or expel members. (b) Right to regulate its own proceedings. This is sufficiently illustrated by the case of *Bradlaugh vs. Gossett*. Bradlaugh was duly elected a member for Northampton; but he was an atheist and the Speaker did not allow him to take the necessary oath under the Oaths Act. The House directed Gossett, who was the Sergeant-at-Arms by a resolution, to exclude Bradlaugh from the House. Bradlaugh brought an action against him. It was held that "the House of Commons has the exclusive power of interpreting a Statute so far as the regulation of its own proceedings, within its own walls, is concerned, and even if that interpretation is erroneous the Court has no power to interfere with it directly or indirectly." The House, however, cannot alter any law by its resolution so as to affect the rights to be exercised outside and independently of the House. In such cases, the Court will exercise its jurisdiction to see if such a resolution is illegal. This was illustrated by the case of *Stockdale vs. Hansard*, which also brought into prominence (c) the right of the house to commit for contempt for breach of its privileges. Hansard, the defendant, published a report by the Inspector of Prisons containing certain defamatory statements about Stockdale, and sold it by the order of the House. Stockdale brought an action for damages. In defence it was pleaded that the publication was privileged by the order of the House. The House further passed resolutions saying (i) that the order of the House is ample justification for the sale of any papers; (ii) that the decision of the House on a question of Parliamentary privilege is final; and (iii) that the Courts cannot decide any question of Parliamentary privilege either directly or indirectly. The Court had to decide whether a resolution of the House, authorising the act (in this case publication of a libellous matter) precluded the Court from enquiring into the legality of the act. It was held that although no action would lie for things done within the House, its order if illegal, could not help those who carried that illegal order into effect outside the House. Such a resolution was no bar to an enquiry by a Court as to the legality of such an act. Hence, the House by a mere resolution cannot, under the plea of privilege change the law and make libellous matter non-libellous. It cannot make legal what is illegal under the law of the land." This decision settled the position that one House individually cannot change any law and that its resolution has not the force of law. As a sequel to the case of *Stockdale vs. Hansard*, the case of *the Sheriff of Middlesex* established the right of the House to commit for contempt any person for breach of its privileges. In execution of the judgment in the former case of *Stockdale vs. Hansard*, the Sheriff seized the goods of Hansard. He (the Sheriff) was arrested

and imprisoned for contempt of the House of Commons by an order signed by the Speaker. An application was made to the Court for a writ of *Habeas Corpus*. It was held that if the House of Commons commit a person for contempt, without stating any grounds, the Courts have no jurisdiction to interfere even if the House was wrong in regard to its view of the privilege. On the other hand, if the House gives reasons for contempt and they are arbitrary, unjust or contrary to the principles of justice, the Courts may interfere. The House saw its mistake in this case soon afterwards and an Act was passed protecting persons publishing any matter by order of either House of Parliament. Two other privileges of the House are (d) the right to exclude strangers and (e) the right to prohibit publication of its debates.

Ashby vs. White : We have already seen above how the House of Commons came into conflict with the Courts of Law regarding its privileges. *Ashby vs. White* is also a case which illustrates and establishes the principle that the privileges of either House being based on law, either common or statute, their limits may be ascertained and defined by the Courts of Justice. Ashby was duly qualified to vote in an election but was prevented by the returning officers, White and others. The candidates for whom he wanted to vote were, however, duly elected. The Court gave a verdict with £ 500 damages and costs. The Court of the Queen's Bench reversed it saying that it was a Parliamentary matter with which the Courts had nothing to do, that the right of voting is not a matter of property or profit and that its hindrance is merely an instance of damage without infringement of any legal right. On appeal, the House of Lords, sitting as a Court, reversed the decision of the Queen's Bench and held that franchise is not an inconsiderable right and interference with it is an injury or infringement of a legal right, although without any special damage. While this case was pending, the House of Commons passed a resolution that Ashby was guilty of a breach of privilege of the House in having applied to the Court for relief instead of to the House itself. Similar actions were brought by others who were with their legal advisers committed by the House for contempt.

67. Supremacy of the Commons : Besides these privileges, the Lower House has gained one more important privilege, in recent years. The *Parliament Act, 1911*¹ makes it a dominant body and relegates the House of Lords to a subordinate position in matters of legislation. (i) In regard to all *money bills*, i.e., bills authorising expenditure or taxation, the Act practically takes away all legislative power from the House of Lords. If a money bill is sent up to the Lords at least one month before the end of the session and is not passed by that House in one month, the bill, unless the House of Commons otherwise directs, is to be presented to the Crown and becomes an Act on receiving Royal assent. In regard to all public bills, other than money bills, the Act

1. For the main provisions of the Act, See Ch. V,

allows the House of Lords to exercise a mere suspensive veto, whereby it can prevent the bill from becoming an Act for a period of little more than two years. Such a bill, if passed by the House of Commons in three successive sessions, is sent up to the House of Lords at least one month before the end of each session and if rejected by that House in each of those sessions and a period of two years has elapsed between the date of the second reading in the Commons in the first session and the date on which it passes the Commons in the third session, then that bill is presented to the Crown and on receiving his assent becomes an Act of Parliament.

CHAPTER IV

PARLIAMENT (*continued*)

4. MINISTRY AND CABINET

68. Ministry : It has been made clear that the powers of the Crown are exercised by the Ministers, whom he chooses only in theory and over whose acts he has no control. It may be defined as a group of higher executive officials, who are obligated by rigorous custom to resign office if the House of Commons deliberately withholds approval of their policy and this characteristic distinguishes a Minister from any other member of the executive. They are nominally appointed by the King, in reality by the Prime-Minister. It includes heads of departments, members of various boards, some under-secretaries and others. Unlike the Ministers, who have a political career, the mass of executive and administrative officers are permanent and their tenure is not affected by ups and downs of party politics. The work of administration is directed and carried on in certain executive departments and most of the Ministers are in charge of or otherwise attached to these departments.

69. The Treasury : This department originated from the Exchequer of Norman times. The duties connected with it are assigned to a Treasury Board of five members, including the First Lord of the Treasury, who is, very often, the Premier. But he is only the nominal head. It is the Chancellor of the Exchequer who draws up the annual budget and performs other important functions of the Treasury. In reality, the Chancellor is concerned only with direction and policy framing and not with the actual administration of the department. The functions of the collection of revenue and disbursement of money are discharged under the direct supervision of the Comptroller and Auditor General. Subordinate to the Treasury are the four great offices : (1) Post Office, (2) Customs, (3) Inland Revenue and (4) Woods, Forests and Land Revenues. The first is presided over by a responsible Minister; the other three are in the hands of the Civil Service and are represented in Parliament by the Chancellor of the Exchequer, or his deputy, the Financial Secretary to the Treasury.

All revenues are payable at the Bank of England to the account of the Exchequer and all national disbursements are made out of the fund so collected and known as the Consolidated Fund. Most of the taxes are imposed by permanent Statutes but some are laid afresh every year and are liable to annual revision. Similarly, some expenditures are regulated by standing laws and others by annual appropriations. Most disbursements fall in the latter category; only those which it is particularly desirable to keep out of politics, e.g., the Civil List, the salaries of Judges, the interest on national debt, etc., aggregating to about one-fourth of the total expenditure, are paid without annual authorisation. The Comptroller and Auditor-General's duty is to see that all expenditures are authorised by Parliament. The Bank, on his order, pays the amount to the Paymaster-General for distribution to proper departments.

70. The Navy and the Army: Since 1708, the administration of the Navy is carried on by the Admiralty Board. This Board consists of a First Lord, four or more Naval Lords, one or more Civil Lords, a Parliamentary, a financial and a permanent Secretary. The first Lord, the Civil Lord and the Parliamentary Secretary are invariably members of Parliament. The First Lord has also a seat in the Cabinet. Practically, he is the Minister of Marine and other members of the Board are reduced to the position of mere advisers. The administration of the army is also vested, similarly, in a body known as the Army-Council. It consists of three Ministers in the War Office and four professional officials, and is presided over by the Secretary for War.

71. The Foreign Office: The Secretary of State for Foreign Affairs manages the relations with foreign States, aided by a Parliamentary, a permanent and several assistant Under-Secretaries. The operations are carried on partly by direct correspondence, but mainly through ministers, ambassadors, consuls and various other officers. The work of this department is naturally of a very confidential character. Consequently, the department remains to a certain extent immune from Parliamentary control. The Premier is kept fully informed of what is going on and the Sovereign is also freely consulted, who wields influence more frequently here than in any other department.

72. The Home Office: The Secretary for Home Affairs, assisted by his various Under-Secretaries, deals exclusively with domestic affairs. Unlike France, he has nothing to do with the supervision of local government. The work of the department consists of (1) receiving and transmitting petitions to the Crown, (2) preparing and counter-signing warrants, (3) administering the naturalization laws, (4) controlling the London Police, (5) inspecting the police elsewhere in the country, (6) governing the Channel Islands and the Isle of Man, (7) advising the Sovereign upon the exercise of the power of pardon and (8) approving the arrangements for the circuit judges and others.

Constituted almost on the same line as the Home Office or the foreign office, there are four other departments, viz., (1) the India Office, (2) the

Colonial Office, (3) the War office and (4) the Air Ministry. These departments are managed by the Secretaries of State, assisted by various Under-Secretaries.

73. The Lord High Chancellor: There is nothing like a department of Justice in England, as on the Continent or in America. The work is divided among several officials, the most prominent being the Lord High Chancellor. Originally, he was merely the King's scribe. In time, he became a trusted adviser and the redress of grievances for which the common law made no provision, came into his hands. After the fusion of the common law and equity courts in 1873-76, the control of judicial appointments passed into his hands. He is the chief Judge in the High Court of Justice and in the Court of Appeals; he is the law-member of the Cabinet and gives his colleagues expert advice; he appoints and removes the County Court Judges and presides in the House of Lords. There are two other important officers, the Attorney-General, and his colleague and substitute, the Solicitor-General who are known as the "Law Officers of the Crown" and represent the Crown in legal proceedings, especially in criminal and political trials.

74. Various Boards: Various administrative Boards, of comparatively recent origin, are established not for direct administration, but for supervision and regulation of private organisations and of local authorities. At the head of each Board is a President known as the First Commissioner, who performs the work aided by his staff and a parliamentary Under-Secretary. Nominally, there are other members including the Secretaries of State and certain other important persons, but the Board so composed never actually meets. The Board of Trade, the Board of Education, the Board of Works, the Local Government Board, the Board of Agriculture and others fall into this category. They are in fact so many Committees of the Privy Council.

75. Cabinet: The oldest body of King's advisers, known to the law of England, is the Privy Council. The number of Councillors is not fixed; at the present day it is about three hundred. Such a body is too large to admit of the requisite despatch and secrecy and hence a smaller group which is now known as the Cabinet was formed. Although unknown to law, this small body is the most important council in the governmental system of the country. A Cabinet Member has authority and is known to law as a Privy Councillor. The Privy Council is only a formal institution now and meets only on ceremonial occasions, as important state functions can be legally performed in its name by as few as three of its members. Hence, any ordinary meeting of the Cabinet fulfills all legal requirements for a meeting of the Council. In fact, the Cabinet is one of the Committees of the Council; there are various other Committees carrying on continuous and important work, e. g., the Judicial Committee for hearing appeals from Courts outside the United Kingdom as also the various Boards mentioned above.

76. Composition: All those members of the Ministry, with the exception of three or four, who direct the affairs of the main departments and collectively shape the policy and manage the conduct of the government, as a group, form the Cabinet. As a body it is unknown to law; its members derive their executive functions from their appointment to a ministerial post and their advisory functions from their membership in the Privy Council. Most of them gain admission to the Privy Council because of their appointment to ministerial posts. It invariably includes all the Secretaries of State, the First Lord of the Treasury, the Lord Chancellor, the Chancellor of the Exchequer, the First Lord of the Admiralty, the Lord President of the Privy Council and the Lord Privy Seal, the last having no executive functions to perform. Beyond this, it is left to the discretion of the Prime Minister, whether to include a Minister in the Cabinet or not. His decision may be influenced by the wishes of the Minister concerned, or by the importance of his office for the moment or by party interests. At any rate, the number of members has never been fixed; and in fact the size of the group has steadily increased. Thus, it will be noted that "Cabinet" is a smaller group formed out of the "Ministry."

77. Selection of Ministers: When a new Ministry is to be formed the King sends for the man, who is best able to command a majority in the House of Commons, names him the Prime Minister and asks him to form a Ministry. The King's choice in the matter is limited, by a longstanding convention, to the recognized leader of the party that is in majority in the Commons and he cannot do otherwise. The Premier so selected nominates in his turn, other members of both the Ministry and the Cabinet, in consultation with the leading members of the party. The list of these nominees is placed in the hands of the King, who formally approves of the same and then the list is published in the Gazette. The persons named therein are, in theory, said to have been chosen by the King to occupy the several posts. The "Cabinet" as such is not mentioned officially. The Premier too has not a free hand in the matter of selection; he has also to comply with certain principles. Firstly, all the members selected by him must have seats in one or the other of the two Houses, and secondly, all of them must be identified with the party in power or at least with an allied political group. If it is desired to bestow a ministerial post upon a man who is not a member of either House the difficulty may be got over either by making him a peer, which would entitle him to a seat in the House of Lords, or by procuring his election to a seat in the House of Commons. Besides, a Statute of 1858¹ prevents more than five principal Secretaries of State and five Under-Secretaries from sitting in one House at the same time and the Lord Privy Seal, the Lord High Chancellor and the Lord President of the Council almost invariably belong to the House of Lords. Beyond this, there is no positive requirement, in either law or custom.

1. An Act for the Better Government of India (21 & 22 Vict. c. 106) sec. 4 (since amended).

78. The Recent Event: The provisions of the Act of 1858 were violated by the present Premier Mr. Macdonald while forming his Labour Cabinet (in 1929), inasmuch as more than requisite number of principal Secretaries of State and Under-Secretaries were selected from the House of Commons. After the Cabinet was formed the Premier's attention was drawn to the legal defect in its formation and he was obliged to re-shuffle the various offices. Dr. Drummond Shiels, who was formerly appointed Parliamentary Under-Secretary of State for India, was transferred to the Colonial Office and Earl Russel was appointed in his place. Mr. Arthur Ponsonby took the place of Earl Russel in the Ministry of Transport and instead of being the Under-Secretary he became the Parliamentary Secretary. The Indemnity Act was also passed to validate the appointment of all these Ministers and to indemnify them against the penal consequences incurred by them by sitting and voting in the House of Commons while holding offices to which they were not legally entitled.

79. Unity, the chief requisite: The Premier brings together persons, who will work together most effectively, to fill the various posts. They need not be the ablest men available in the Parliament. Unity and party harmony are the most necessary requisites. It is the obligation of every Cabinet member to agree, or to appear to agree, with his colleagues. If he is unable to do so, he must resign.

80. Responsibility of Ministers: Every Minister, whether or not in the Cabinet, is, *in theory, individually responsible* to parliament, *i. e.*, to the House of Commons for all his public acts; and he has to resign if he is made the object of a vote of censure. *In practice*, responsibility of the Cabinet is *collective and not individual*. If an individual Minister falls into dis favour he is either persuaded by his colleagues to modify his course or to resign before an adverse Parliamentary vote is passed. If not, the Cabinet as a whole rallies to his support and stands or falls with him. There are four ways in which a Parliamentary majority manifests its dissatisfaction with a Cabinet and thereby compels its resignation: (1) by a simple vote of "want of confidence" assigning no definite reason for it; (2) by a vote of censure for some specific act; (3) by defeating the measure which the Cabinet advocates and declares to be of vital importance; and (4) by passing a bill in opposition to the advice of the Ministers. When any of these four votes is carried in the Commons the Cabinet can do one of two things: (1) if it is clear that the Cabinet has lost the support not only of Parliament but also of the electorate, the Ministry has to resign; (2) if there is doubt as to whether the Parliamentary majority really represents the country upon the matter at issue, the Prime Minister will be warranted in requesting the King to dissolve Parliament and to order a general election. In the latter case, the Ministry continues in office until the general election is over. If the elections return a majority prepared to support the Ministers, they get a new lease of life. If, on the contrary, the majority is hostile, the Ministry must retire.

81. Secrecy of Proceedings: Being collectively responsible to Parliament, the Cabinet has to present a solid and imposing front and this is done by keeping its proceedings secret. It is a recognised principle that a group of men, who have to agree upon and execute a common policy, will succeed in doing so only if their differences are not published to the world. Although notices of Cabinet meetings and the names of the members present appear in the press, nothing is said about the proceedings or about the decisions arrived at except what is officially reported. A regular record of all such proceedings is kept and the Prime Minister's secretary sends a record of every decision to every member of the Cabinet and to any other Minister or department affected thereby.

82. The Prime Minister: Another device to preserve solidarity is the leadership of the Premier. His office was not recognised by law until 1906, although for more than a century no public office was comparable with it in volume of actual power. He is the guiding force in the Ministry and more particularly in the Cabinet. He presides at Cabinet meetings and advises his colleagues upon matters affecting the administration's welfare. He holds the office of the First Lord of the Treasury in particular, but in general, he exercises supervision and control over all other departments. He is the link between the Cabinet, the Crown and Parliament. On behalf of the Cabinet, he advises the Sovereign and communicates to him information concerning ministerial acts and proceedings in Parliament. In the House, he is the Leader thereof, represents the Cabinet as a whole, makes necessary statements and speaks upon every general or important projected piece of legislation.

83. Position of the Cabinet: In the English constitution, the Cabinet is the keystone of the arch. It is a Committee chosen by Parliament to rule the nation. It is the link that joins the executive and legislative departments together. It is this body that decides upon the executive and administrative policies and the Ministers and their subordinates put these policies and the laws of the land into effect. On the other hand, the Cabinet members also direct individually and collectively the entire work of legislation. Although private members may submit bills in either house, it is an unwritten rule that measures of large importance will receive the serious attention of the Houses only if they emanate from, or at all events, have the active support of the Cabinet. In fact, private bills, if they deal with large or controversial matters, have very little chance of being passed.

5. ORGANISATION AND PROCEDURE

84. Annual Sessions: In theory, the law requires that Parliament shall be convened at least once every three years. In practice, however, meetings are annual. As has been already stated, supplies are voted by Parliament for a period of one year only at a time, and therefore, annual sessions are necessary. A session generally begins in February and continues till August or

September, with brief intervals for holidays. Both Houses must be summoned together, though either House may adjourn without the other. A *prorogation* which brings a session to a close and a *dissolution*, which brings a Parliament to an end, must be ordered for the two Houses concurrently, nominally by the King and actually by the Cabinet. The dissolution only puts an end to the legislative functions of a Parliament. The judicial functions of the House of Lords continue to be exercised during prorogation or dissolution of Parliament.

85. Members for Parliament, *i. e.*, for the House of Commons are elected by various constituencies in the Country, at the general election held, usually, at the end of every five years. This period of five years is the normal life of a Parliament, as laid down in the Parliament Act of 1911. But a contingency may arise, when it may be dissolved earlier. If the Cabinet loses confidence of the Lower House, they, instead of resigning office, may advise the King to dissolve Parliament. So, either in the case of such a contingency or at the end of the usual period of five years, when Parliament is dissolved, a fresh general election is held. In theory, the King summons, prorogues or dissolves Parliament at will; in practice, he acts in this matter, as in other functions of State, on the advice of his Ministers. If a Sovereign dies while Parliament is either sitting or is in prorogation, it continues to exercise or resumes its functions, until it is prorogued or dissolved by his successor. If a Sovereign dies after the dissolution of one Parliament and before the date appointed for the assembling of a new one, the dissolved Parliament meets and continues to function for a period of six months, unless it is prorogued or dissolved sooner. In the case of prorogation, the members have to be merely summoned again. The death or expulsion of a member or his acceptance of office creates a vacancy in the House, which is filled up by a bye-election.

86. Election of Speaker: At the beginning of the first session of a new Parliament the two Houses meet, first of all, in their respective chambers. The Commoners are then summoned to the chamber of the Lords, where the Letters Patent authorising the session are read and the Lord Chancellor makes known the desire of the Crown that the Commons proceed to choose a Speaker. The Commoners then withdraw to their chamber and proceed with the election of the Speaker. The newly elected Speaker accompanied by the members presents himself next day at the bar of the House of Lords, announces his election and receives the Royal approbation through the Lord Chancellor. He then *demand*s and receives a guarantee of the ancient and undoubted rights and privileges of the Commons. They then retire to their quarters where necessary oaths are administered. After this the Commons have to go to the House of Lords once again. If the King attends in person, he goes in State to the House of Lords and sits on the Throne. Then the Lord Chamberlain asks the Gentleman Usher of the Black Rod to *command* the attendance of the

Commons. If the King does not go, the Lords Commissioners ask the Usher to *desire* the Commons' presence. The King (and in his absence the Lord Chancellor) then reads the Speech from the Throne prepared by the Cabinet, in which the government programme for the session is set forth. The King then *retires and after that the Commons withdraw to their chamber*. The Speech from the Throne is re-read in both Houses and an address in reply is voted by each House. The session is then open for the introduction of fiscal and legislative proposals of the Cabinet. If the session is not the first one of a Parliament, the above procedure, with the exception of the election of the Speaker and the administration of oaths, is repeated.

87. The Speaker : The Speaker is elected at the beginning of each Parliament from amongst the members and his tenure of office, unless terminated by resignation or death, continues through the term of that Parliament. Nominally, the choice of the House is subject to the King's approval, which has never been refused since 1679. A convention is long since established that he should not be proposed or seconded by any member occupying a seat on the Treasury Bench. It has become customary, however, to re-elect the Speaker, if willing to serve. The newly elected Speaker then expresses his grateful thanks for the high honour conferred on him, before he takes *his seat and then pays a tribute to the retiring Speaker*. His functions are numerous and highly important, regulated partly by rules of the House and partly by legislation. As president of the House, he is strictly a non-partisan moderator, whose business it is to maintain decorum in deliberations, decide points of order, put questions and announce the result of votes. A custom as strong as law forbids him to render help to his own side even by private advice. He makes no political address when he seeks re-election from his constituency at a general election. He never publicly discusses politics and never enters a political club. He does not vote except in the event of a tie. He acts as the spokesman and representative of the House, whether in demanding privileges, communicating resolutions or issuing warrants. He declares and interprets the law of the House. Where precedents, rulings and orders of the House are insufficient or uncertain guides, he has to decide what course would be more consistent with the usages, tradition and dignity of the House and the rights and interests of its members. By the Parliament Act of 1911, he is given the sole power, when doubt arises to determine whether a particular measure is or is not a 'money bill.' The symbol of his authority is the Mace, which is carried before him when he enters and leaves the House and lies on the table before him, when he is in the chair. He has an official residence and receives a salary of £ 5000 per annum. Upon retirement he is sure to receive a pension and a peerage.

88. Other Officers : Besides the Speaker, there are other officers of the House, viz., the Clerk and his assistants, the Sergeant-at-Arms and his

deputies, the Chaplains, and the Chairman and Deputy Chairman of Ways and Means. The Clerk and his assistants are non-political officers appointed for life. The Clerk signs all orders of the House, endorses bills sent or returned to the House of Lords, records the proceedings and with the concurrence of the Speaker supervises the preparation of the Official Journal. The Sergeant at Arms and his deputies are also non-political officers and are appointed for life. They attend the Speaker, enforce the House's orders and present at the bar of the House persons ordered or qualified to be so presented. The Chairman of Ways and Means (and in his absence the Deputy Chairman) presides over the deliberations of the House, when it sits as a Committee of the Whole, and exercises supervision over private bills. Though they are political officers, they preserve a strictly non-partisan attitude, in both capacities. They are elected for the term of a single Parliament by the House.

89. Salary for members: In the Middle Ages, representatives to Parliament from counties and boroughs received some compensation from their constituents. Many constituencies considered this a burden and applied to be discharged from this costly privilege of sending a representative. During the Tudor period, the payment of members became obsolete. 'As is well known, the cost of election and of maintaining oneself as a member of Parliament practically debarred men of slender means for centuries from getting a seat. After 1900, the Labour party began to subsidize its needy representatives and for that purpose dues were collected from various labour organisations. This was declared contrary to law by the House of Lords, on an appeal, in December 1909. This decision gave fresh impetus to an agitation started by the Chartists three-quarters of a century ago, for payment to members so that poor but capable men might not be kept out of the Commons. Consequently, a resolution was carried in the House of Commons on 10th August 1911, for the payment of a salary of £ 400/- a year to every member of the House, excluding any member who is for the time being in receipt of a salary as an officer of the House, or as a Minister or as an officer of His Majesty's Household.' The Unionists and the Liberals were opposed to the innovation, but in due course, the measure became law.

90. The House of Lords and its officers: Although the two Houses are convened together, the sittings of the Lords are briefer and more leisurely than those of the Commons. Normally, the House meets four times a week and the sittings are concluded within an hour. Attendance is always scant except on formal occasions and at times when a measure, in whose fate the members are specially interested, is under consideration.

The Lord Chancellor, appointed by the King on the advice of the Premier, is the presiding officer. He may or may not be a peer. If he is not a peer, he will not be a member of the House. If he is a peer he may speak and vote but he has no casting vote. His position is purely formal and has no powers even of a moderator. In his absence, one of the deputy officers presides.

Amongst other officers are : (1) the Clerk of Parliament, who keeps the records, (2) the Sergeant-at-Arms, who attends on the Presiding official and acts as the custodian of the Mace, and (3) the Gentleman Usher of the Black Rod, whose function is to summon the Commons when their attendance is required and to play useful part on ceremonial occasions. These three officials owe their position to governmental appointments. One important officer that the House itself elects is the Lord Chairman of Committees, who presides in the Committee of the Whole.

91. Committees : Five kinds of Committees are devised to economise the time of the House of Commons. (1) *The Committee of the Whole*. This is simply the House of Commons presided over by the Chairman of Ways and Means or his deputy, in place of the Speaker. It acts under rules of procedure which permit almost unrestricted discussion and free consideration of the details of a measure. When the subject in hand relates to the revenues it is known as the Committee of Ways and Means, and when to appropriations, as the Committee of Supply. (2) *Select Committees on public bills*. Each of these Committees consists of fifteen members and is selected either by the House or the Committee of Selection to investigate and report upon specific subjects or measures. It keeps detailed reports of its proceedings, which is included with its formal report, in the published Parliamentary papers of the session. It passes out of existence after it has fulfilled the immediate purpose for which it is set up. (3) *Sessional Committees on public bills*, and (4) *Standing Committees on public bills* are also bodies of almost the same type as Select Committees appointed to investigate and report upon particular measures. Select Committees appointed for an entire year are known as Sessional Committees, e.g., the Committee on Public Accounts. A Standing Committee may also include not fewer than ten and not more than fifteen temporary members, who may be experts on the subject in hand. (5) *Committees on private bills* are similarly appointed to investigate and report upon private measures.

The *Committee of Selection*, already referred to above, consists of eleven members chosen by the House at the beginning of each session, after a conference between the leaders of the Government and of the Opposition, which ignores party lines. It appoints members of Select Committees, of Standing Committees and of Committees on private and local bills. It also designates a "Chairman Panel" of eight to twelve members, which selects the Chairman for each Committee from amongst the ranks of that particular Committee.

92. Procedure : As has already been stated, private members' bills have very little chance of passing, especially if they are not likely to get support of the majority, if the Cabinet is opposed to it ; and in fact very little time is allowed for the consideration of such bills. The number of such bills has steadily decreased. It is the Cabinet that really legislates with the advice and

assent of Parliament. It decides what measures are to be brought before the Houses, introduces them, presses for their passage, takes full responsibility for them after they are passed, and gives up the attempt to govern, if any of them is rejected by the Commons. Such measures are known as the 'Government Bills.' The private members are entitled to criticise these measures or propose amendments to them, besides having a right to bring in a few motions and bills of their own, if they so desire. It does not follow, however, that the Cabinet's action is arbitrary. It always feels the pulse of the majority in the Commons and keeps a vigilant watch on the expressions of public feeling outside. In the domain of executive and administrative work, these Ministers are answerable to the House of Commons, singly in small matters and collectively in important ones. Any member of the House can address a question, subject to the Speaker's judgment as to its propriety¹, to any Minister, with a view to obtain information. Except in special cases, notice of questions must be given at least one day in advance and half an hour or more is allowed at four sittings every week for asking and answering such questions. A Minister may answer or decline to answer, but unless a refusal can be shown to arise from legitimate considerations of public interests, its political effect may be embarrassing. If the matter is an important one, and the House is not satisfied with the Minister's reply, the questioner may ask leave to 'move an adjournment of the House', and if forty members support his request, a debate, nominally on the motion, but really on the substance of the question, takes place. If the Government opposes the motion and is defeated, it must resign, or at least the Minister concerned must. This right of asking questions is liable to abuse, but at the same time it is a valuable safeguard against maladministration. It is an effective method of bringing the search-light of criticism to bear on the action or inaction of the executive. Any member has a right to bring forward a motion censuring the Government as a whole or any Minister or department thereof. If a motion of this sort emanates from the leader of the Opposition it leads to a 'vote of non-confidence' upon whose result may hang the fate of the Ministry. Beyond this, Parliament does not interfere in the details of administration. It does not try to meddle into the internal organisation of the departments or the appointment of their officials. Although, the legislative and administrative functions are united in the hands of the same persons, organically they are

1. In July 1930, Mr. Fenner Brockway, a labour M. P. asked a question to get information concerning political situation in India. The reply given by Mr. Macdonald, the Prime Minister, was not satisfactory and Mr. Brockway insisted upon further information. He was supported by one Mr. Beckett, also a Labour M. P., and both of them created disturbance in the House. The Speaker did not consider the action of the two members proper, suspended them in exercise of his power and asked them to leave the House. Mr. Beckett while going out seized the Mace of the Speaker and tried to carry it away. The Sergeant-at-Arms got it back from him and restored it to its usual place. This was considered an affront to the House, even by the Labour party and resolved to make Mr. Beckett apologize to the House for his action.

always kept separate. It rarely happens that a Ministry will be turned out of office because of its executive acts. So long as the legislative programme holds the support of the Commons, their tenure of office remains unbroken.

93. Public Bills: Before a measure can become law, it has to go through various stages, in both Houses, designed with a view to prevent hasty and ill-advised legislation. As a rule, bills may be introduced in either House, by the Government or by a private member. There are certain classes of bills, however, which must originate in one only of the two Houses. Thus, money-bills originate in the Commons and bills of attainder and other judicial bills in the Lords, only. The procedure in both Houses is substantially the same, except this that amendments to bills may be introduced in the Lords at any stage, but in the Commons at only stipulated stages. The methods of conducting business in the Upper House are more elastic than those prevailing in the Lower one.

The *first stage* is the *drafting* of the bill. If it is a Cabinet measure it is drafted by one of the two officials known as Parliamentary Counsel to the Treasury or by some independent expert specially engaged. The private member's bill is either drafted by himself or by anyone whom he may employ for the purpose and bears on its back the name of such member.

The *next stage* is the introduction of the bill, so prepared, in the House for the *first reading*. Some very important Government bills are introduced at this stage with a speech explaining at length the nature of the bill, which is followed by a debate and a vote, sometimes consuming several sittings in the process. In all other cases, this stage has become a mere formality. The member wishing to introduce the bill gives notice to that effect and circulates printed copies of the same among the members of the House, technically known as 'laying the bill on the table'. The discussion at this stage, if at all, relates to general principles rather than to details. If a bill is to be killed at its first reading, a motion is adopted to the effect that the bill be read a second time at some date falling beyond the anticipated limits of the session.

At the *second reading* of the bill opportunity for debate is first afforded, when its principles as well as some of its details may be discussed. The bill that survives the second reading, goes to a *Committee*. If it is a money-bill, or a bill for confirming a provisional order, or if, on other grounds, the House so directs, the bill goes to the Committee of the Whole; otherwise, it goes to one of the Standing Committees assigned by the Speaker. It may, however, be referred to a Select Committee instead and after it is returned by that Committee it goes to the Committee of the Whole or to one of the Standing Committees. At this stage, the bill is thoroughly considered in all its details and amendments introduced. If reported by a Standing Committee or in amended form by the Committee of the Whole, it is considered by the House afresh and in some detail. This is known as the "*report stage*". This stage is sometimes

ommitted. Finally comes the *third reading*, the question now being whether the House approves of the measure as a whole. Any amendment, beyond verbal changes at this stage, makes it necessary to recommit. The whole stage may take several days or several weeks. It is not impossible, however, for the entire process to be completed during the period of a sitting. The bill is then taken to the other House where it goes through substantially the same procedure. If amendments are introduced, it is sent back to the originating House where suggested changes are considered. If they are agreed to, the bill is deposited with the House of Lords to await the Royal assent and after having been so assented to as a matter of course, is proclaimed as law. If the amendments are rejected by the originating House and an agreement between the Houses cannot be reached, the bill fails.

94. Money Bills : The procedure for money bills is a little different. After the Parliament Act of 1911, the authority of Parliament in the domain of finance is wielded solely by the House of Commons. The first step is the preparation of the *estimates*, by the executive, every year, concerning expenditure on Supply Services, which require annual authorisation from Parliament. The expenditure on the Consolidated Fund Services although subject to alteration by Parliament, are authorised by permanent Acts. Three fundamental rules are to be observed : (1) No motion entailing a charge on the public revenue can be entertained unless the outlay is asked for or supported by the Crown. This prevents *private* members from introducing appropriation bills or resolutions. (2) Every request for funds should be submitted in the form of an estimate, *i.e.*, a document containing careful calculation of the amount needed for a designated purpose, with a demand that the amount be granted for the purpose specified. (3) All such estimates shall be examined and approved of by the Treasury.

The work of preparing these estimates begins as early as October 1, preceding the fiscal year to which they relate, when the Treasury sends a circular to all the departments to make up and submit their estimates. Throughout the work, closest contact is maintained with the Treasury and all alterations of the existing arrangements are referred to it. As a result, the estimates finally submitted to the Treasury represent the statement of proposals already agreed to between the various departments and the Treasury. Matters of general policy likely to entail large expenditure are thrashed out in conference between the Treasury and the department concerned, and also, in Cabinet discussions.

The estimates thus become ready by the time Parliament meets in February, when they are presented during the first two weeks of the session. The House resolves itself into a Committee of Supply, sitting under the presidency of the Chairman of the Committees and proceeds to consider the estimates by successive votes. The estimates are grouped in about 150 divisions for the

purpose of discussion and a separate vote is taken on each of them in the form of a resolution. Every such resolution is re-adopted in the form of a bill and eventually all these bills are gathered into one grand Appropriation Act. During the process, a private member can move a reduction but not an increase in a demand. The Committee of Supply can vote the grant asked for or refuse it. It cannot increase it, annex a condition or alter its destination, but it may induce the Government to introduce a revised estimate.

While this work is going on, the Treasury also keeps ready the estimates of revenue which can be expected from existing taxes, from proposed increases in the same and from the new taxes proposed to be levied. Soon after the opening of the financial year on April 1, the House is reconstituted as the Committee of Ways and Means and the Chancellor of the Exchequer presents these estimates, known as his *budget*. This financial statement is buttressed by other documents giving in great detail the estimated income and expenditure of the year. These estimates of income are considered in the same way as estimates of expenditure and the resolutions adopted thereon are incorporated in bills. These are gathered in two main Acts—the *Finance Act*, reimposing the tea duty and the income tax and the *Revenue Act*, giving effect to amendments of the revenue laws passed by the House. Private members are not allowed to move new taxation; they can only move to repeal or reduce taxes which the Government has not proposed to alter.

95. Private Bills: Both a Government bill and a private member's bill are public bills, if they affect the general interests of the state and have for their object the promotion of common good. A private bill, on the other hand, is one which has in view the interests of some particular locality, person or class of persons. The most common object of such bills is to enable persons to enter into combinations to undertake works of public utility, such as, building of railways or harbours, the supply of gas, electricity or water, and such other enterprises. The promoters as well as opponents of such bills have to pay the prescribed fees.

After being examined and approved of by Parliamentary officials known as Examiners of Petitions on Private Bills, a private bill is introduced in one of the Houses. That introduction serves as its first reading. At the second reading, a debate on the principle of the measure may take place. If opposed, it is referred to a Private Bill Committee, consisting of four members and one disinterested referee; if it is not opposed, *i.e.*, if no adverse petition is filed by property owners, corporation or other interests, the Committee is composed of the Chairman and Deputy Chairman of Ways and Means, two other members of the House, appointed by the Committee of Selection and the Counsel to the Speaker. The committee stage of a contested bill assumes a judicial aspect, promoters and opponents are represented by Counsel, witnesses are examined and expert testimony is taken. After being reported, the Bill goes through

the procedure as public bills and becomes an Act. One thing must, however, be observed. It has now become common for the promotion of such enterprises to make use of the device known as "*provisional order*." Such an order is issued, after investigation by a government department authorising provisionally the undertaking of the project. Such orders are submitted to the Houses in batches by the several departments and their ratification is virtually assured in advance.

96. Hybrid Bills : There may be some bills, which are partly public and partly private in contents. They are handled under some circumstances similar to the one and under others similar to the other or even under a procedure combining features of both.

97. Rules of the House : Various rules are devised for the conduct of business in the House of Commons. They consist of (1) *standing orders* which are of a permanent character, (2) *sessional orders*, operative during a session only, and (3) *general orders*, indeterminate in respect to the period of application.

While speaking, the members address their remarks to the Speaker, and when more than one desire to speak, the Speaker designates with scrupulous impartiality, who shall have the 'floor' of the House. When a 'division' is in progress, the members speak seated and covered; at all other times they speak standing and bare-headed. No member is allowed to read his speech from a manuscript. The Speaker has the right not only to warn against irrelevance or repetition, but also to compel a member to terminate his speech. A member whose conduct is reprehensible may be ordered to withdraw and upon a vote of the House, may be suspended from service. A member may not speak twice upon the same question except in Committee although he may be allowed to explain portion of his speech, which has been misunderstood. The Speaker may decline to put a motion if he considers it dilatory.

There are *three special devices* to keep the debate within bounds of time and these are different forms of closure. (1) *Simple closure* is now incorporated in Standing Order 26, which says: "After a question has been proposed, a member rising in his place may claim to move 'that the Question be now put' and unless it shall appear to the Chair that such a motion is an abuse of the Rules of the House or an infringement of the rights of the minority, the question 'that the Question be now put' shall be put forthwith and decided without amendment or debate." Discussion may thus be cut off instantly and a vote brought on. For this motion to be operative, there must be at least 100 members voting in the majority for its adoption, in the House, and at least twenty, in a Standing Committee. (2) The *Gullotine* is a closure by compartments. When this is employed the House agrees in advance upon an allotment of time to the various parts or stages of the measure and at the

expiration of each period the debate is closed and a vote is taken. (3) The *Kangaroo* is a form of closure in which the Speaker is authorised by the House to pick out for discussion from the amendments proposed for any clause those which he considers most important. Thereupon a debate can take place on those particular amendments only and on no others. The form is so nicknamed because the Speaker hops Kangaroo-fashion from amendment to amendment.

When vote is taken, the Speaker calls for 'ayes' and 'noes'. He announces the apparent result and the vote is so recorded if his decision is not challenged. If it is challenged, strangers are asked to withdraw, except from the places reserved for them, electric bells are rung throughout the building, the two minute sand-glass is turned and at the expiration of the time the doors are locked. The question is then repeated and another oral vote is taken. If any member still refuses to accept, the Speaker orders a division. The 'ayes' pass into the lobby at the Speaker's right and the 'noes' into that at his left. Four tellers are designated by the Speaker, two from each side, who count the members as they return to their places in the House. The result is then announced by the Speaker.

98. The Rules in the House of Lords: The rules in the House of Lords are more simple. All measures of importance, after two readings, are considered in the Committee of the Whole and then referred to a Standing Committee for textual revision. The measure comes back to the House reported and is then finally adopted or rejected. Committees are appointed for the session or created from time to time, as and when required. Important questions are decided as a rule, by a division. The 'ayes' pass into the lobby at the right of the Woolsack and the 'noes' into that at its left. They are counted by tellers appointed by the presiding officer. The neutrals take their stand on 'the steps of the Throne'.

99. Records of Parliament: It was after 1834 that provision was made for the accomodation of reporters. Despite that, the records published were fragmentary and inaccurate. In 1869, the firm of T. C. Hansard began to publish the *Register* and the *Debates* which subsequently passed into the hands of other publishers. In 1877 the Government began to subsidize the publication, which still remained unofficial. In 1909, private enterprise was replaced by official publication. The task of preparing it was entrusted in each House to a staff of its own reporters. The records of each day's debates in the Commons are now prepared by these reporters and are distributed in an unrevised form to members next morning by breakfast time. The House of Lords, however, does not permit to put its reports into print until the members have had an opportunity to revise the proof-sheets of their speeches.

CHAPTER V

SOVEREIGNTY OF PARLIAMENT

100. Exclusive Power of Law-making: Parliament, as has already been stated, is the supreme authority in all matters concerning the State. It has a right to make or unmake any law, and by 'law' we mean any rule which will be enforced by the Court. The law of England recognizes no other person or body as having authority to override or set aside the law made by Parliament. This exclusive right or power of law-making is not confined to the United Kingdom; it extends to every part of the British Empire, except the Crown Colonies. This right or power is known as the *Sovereignty of Parliament*.

101. Sovereignty of Parliament: Its positive Side: Every legislative act of Parliament will be obeyed and enforced by the Courts. It has a supreme and unlimited legislative authority, which can be seen in a large number of instances, e.g., the *Septennial Act*, whereby the then Parliament extended its life from three to seven years. It was a supreme display of legislative authority, inasmuch as the members then constituting the House of Commons were elected to represent the nation only for three years. By extending their term of office, Parliament deprived the electors of the right of choosing better men in their places. It was direct usurpation of the rights of the people. This proves that from the viewpoint of constitutional law, members once elected constitute a Parliament which is neither the agent nor the trustee for its constituents. Even the succession to the Throne is regulated by this body, by an Act. It is legally the supreme legislative power in the State. This is so both with respect to public as well as private rights of the people. Parliament has habitually given privileges to particular persons or bodies imposing duties or liabilities upon other persons, e.g., the Railway Acts or other local and private Acts. Although private rights are held sacred, Parliament is entitled to interfere with them by such Acts. Such enactments being the legalisation of illegality are the highest exertion and crowning proof of the Sovereignty of Parliament.

A few other Acts may be mentioned as evidencing the supreme authority of Parliament. *The Act of Settlement* was passed in 1700, fixing the descent of the Crown upon Princess Sophia and heirs of her body. The present King therefore occupies the throne by virtue of a Parliamentary title derived from that Act. Parliament, if it so chooses, may repeal that Act and drive away the King. *The Acts of Union*, with Scotland in 1706 and with Ireland in 1707 are also instances of the Sovereignty of Parliament. It was by virtue of those Acts that Scotland and Ireland lost their separate existence and became united with England into the United Kingdom. An *Act of Indemnity*, which legalises illegalities, constitutes the highest exertion and crowning proof of sovereign power. The object of such Acts is to free persons, who have broken the law,

from responsibility for its breach, and thus make lawful, transactions which at the time they took place were unlawful.

102. Its Negative Side: There is *no other competing legislative power*, who can contravene the sovereign power of Parliament. No Court will obey or enforce rules made in contravention of any Act of Parliament. At one time, the King, each of the two Houses of Parliament, the electors, and the Courts of law claimed or might appear to have claimed to possess and exercise, singly, independent legislative powers. On minute examination, however, that claim seems to have been founded on erroneous notions, and cannot be upheld.

(a) **The King** once possessed legislative authority, which, strictly speaking, resided in the "King in Council." Side by side with Parliamentary legislation there existed a system of Royal legislation under the form of Ordinances. He was given the authority by an Act (31 Henry VIII, c. 8) in 1539 to issue Proclamations. This was the highest mark of legislative authority ever reached by the Crown. These Proclamations and Ordinances had the force of law and were recognised and enforced by the Courts. The repeal of the said Act has rendered legislation by means of Proclamations impossible. The Proclamations now have no more weight than what they might possess at common law. While the repeal of this Act has stopped the King from becoming a despot, it has deprived the executive of a power which would have been of great utility. Foreign legislatures generally confine themselves to laying down general principles of law and leave the executive free to work out its details; the English Parliamentary legislation is cumbrous because it endeavours to work it out in all its details. These Proclamations now have, in no sense, the force of law; they are issued only to call attention of the public to some law. They cannot themselves impose any legal obligations, which are not in fact already imposed either by common law or by some Act of Parliament.

(b) **Two Houses of Parliament:** Both Houses, and especially, the House of Commons once claimed that their resolutions have something like legal authority. This claim, however, cannot be supported. At the same time, this much is certain that each House has complete control over its own proceeding and can protect itself by committing for contempt the person who offends it. No Court will enquire into the mode by which the House exercises these powers, which it by law possess. The principle that the resolution of neither House is law, is well illustrated by the case of *Stockdale V. Hansard*. In this case the defendant Hansard was authorised by the resolutions of both Houses to publish their proceedings and sell them outside. One of the publications contained some defamatory statement about the plaintiff Stockdale, who filed a suit for damages against Hansard. The defendant pleaded that he was protected by the resolutions of both Houses. The Court decreed the suit in Stockdale's favour, saying that the resolutions of either House had no legal

authority and cannot change the law of the land, *i. e.*, they cannot render libellous matter non-libellous.¹

The Sheriff of Middlesex attached the goods of the defendant Hansard, in obedience to the decree of the Court as its officer. The Sheriff was thereupon imprisoned for contempt under a warrant issued by the Speaker of the House of Commons. The warrant did not specify any reason for such commitment; it merely expressed the commitment to be for contempt. When the Sheriff was brought before the Court on a writ of *Habeas Corpus*, the judge refused to enquire into the alleged contempt and protect its own officer from being imprisoned by the Commons, on the ground that the House had complete control over its own proceedings and a right to protect itself by committing for contempt any person, who commits any injury against or offers an affront to the House and no Court can enquire into the mode in which it exercises such power.¹

In consequence of this controversy an Act was passed to give summary protection to persons employed in publishing Parliamentary papers by the order of either House. The necessity of such an Act proves that the resolution of either House has no force of law, so as to alter, suspend, or supersede thereby any existing law of the land.

(c) **The Electors:** Likewise, the electors, *i. e.*, those entitled to elect by their votes members for Parliament, have no legislative authority. It is sometimes asserted in political discussions that this body of voters possesses some kind of legislative authority. No doubt, their wishes often influence the action of Parliament, but their sole legal right under the constitution is to elect members of Parliament. They can only influence legislation indirectly through their representatives; they cannot make or unmake any law directly. No Court will say an Act is invalid because it is not supported by the opinion of the electorate. Their opinion can only be expressed through Parliament. Political sovereignty, to a certain extent, is no doubt vested in electors.

(d) **The Courts of Law:** We often hear about judge-made law. The Law Courts, in fact, do not make any new law. Their habit of adherence to precedents, *i. e.*, their tendency to decide one case in accordance with the principles established in a former case, leads to gradual formation of fixed rules for decision. These rules are in effect law. This legislation by the judges is, however, subordinate legislation, based on their interpretation of Parliamentary Statutes. They cannot, by this procedure, repeal any Statute and thus interfere with the supremacy of Parliament. On the other hand, Parliament exercises supervision over the law of the judges and often overrides the same, if it does not approve of it.

103. Limitations on Parliament's Power: Various suggestions have

1. For fuller discussion of the privileges of the two Houses, with particular reference to these two cases, see Chapter 3.

been made as to possible limitations on the authority of Parliament, but none of them is countenanced by English Law. Three such alleged limitations may be considered here:

(1) **Private and Public Moral Law :** It is suggested that if Acts of Parliament are opposed to the principles of morality, *i. e.*, private moral law or to the doctrines of International Law, *i. e.*, public moral law, they are invalid. By this it is meant that Parliament cannot make any law opposed to private or public morality. This assertion is to be taken in a very restricted sense. In theory, there is no such limitation on the power of Parliament. Even if Parliament passed an Act opposed to morality, it will still be law. The advocates of morality go even so far as to assert that the Courts will refuse to enforce such laws. In reality, this only means that judges will give such meaning and interpretation to the Statute as may be consistent with the doctrines of private or international morality. In doing so, they will presume that Parliament did not intend to violate those doctrines. But under no circumstances can this doctrine repeal or over-ride the law enacted by Parliament.

(2) **Prerogative of the Crown:** It is also asserted that Parliament has no power to touch the prerogative of the Crown. This is a matter of history.¹ The Crown did possess once very wide and indefinite powers under the name of "prerogative," and it was also asserted by some of the Kings that this prerogative was superior to the ordinary law of the land. It cost Charles I his head. No doubt certain powers are still left by law in the hands of the Crown, but only in theory; these powers are, in practice, exercised in the name of the Crown by the executive, who are responsible to Parliament for all their official acts. Many of the powers once enjoyed by the Crown, in the name of prerogative, are either abolished or modified by Parliamentary Statutes; those that are still left in the hands of the Crown can equally be abolished or modified by the same body. Any Act of Parliament affecting the prerogative will be enforced by the Courts like any other Act and its validity will never be questioned by them.

(3) **Enactments of preceding Parliaments :** That the legislative authority of an existing Parliament is limited by the enactments of preceding Parliaments, is asserted by some writers. This is sometimes asserted even in Acts of Parliament. Such attempts though often made have always proved futile. In law, no parliament can tie the hands of its successors for all time to come. Various Statutes had been so framed intended to last for ever and some of these have been either repealed or modified, already. A few instances may be quoted. The Act of Union with Ireland, passed in 1707, united the Churches of England and Ireland and made provision for the discipline and government of the United Church to remain in full force for ever. The Irish Church Act, 1869 superseded the said Act and put an end to that arrangement. Another

1. See Chapters 2 and 3

instance is that of the Act of Union with Scotland (1700), which required every professor of Scottish University as a fundamental condition, to subscribe to the Confession of Faith. But the University (Scotland) Act, 1858, relieved the professors from this burden. Some point at the Taxation of Colonies Act, 1778, as a very strong instance of this possible limitation on Parliament's power. It provided that "Parliament will not impose any duty, tax or assessment whatever, payable in any of His Majesty's Colonies, provinces and plantations in North America or the West Indies, except only such duties, as it may be expedient to impose for the regulation of commerce, the net produce of such duties to be always paid and applied to and for the use of the colony, province or plantation in which levied." There is nothing in the law or the conventions of the constitution to prevent the present-day Parliament from altering or amending this enactment. Although prudence and policy may condemn the repeal of this Act, there is no legal difficulty in doing so in the way of Parliament. It is certain that no particular Parliament can bind its successor, an equally sovereign body, perpetually by its enactment. Similarly, a person or body possessing sovereign power, and while retaining the same, cannot restrict its own powers by any particular enactment. It must not be understood, however, that a sovereign body cannot put an end to its sovereignty. It can do so by putting an end to its own existence in two ways : (a) It can dissolve itself without providing means for the constitution or composition of another sovereign body in its place. (b) It can transfer its own sovereign power to another person or body. This was what the separate Parliaments of England, Scotland and Ireland did by the Acts of Union, referred to above, by putting an end to their own separate existence and by transferring their own sovereign power to the united Parliament of the United Kingdom.

Thus the sovereignty of Parliament is complete both on its positive and negative side. It can legislate on any subject whatever and no rival power can interfere with that authority. None of the limitations alleged to be imposed by law on this authority has any real existence. This legislative supremacy of Parliament is the very keystone of the English Constitution.

104. Difficulties in accepting the Doctrine : But some persons experience two kinds of difficulties in accepting this doctrine of Parliamentary sovereignty as true. They say : (1) sovereignty resides either in Parliament or electors; (2) there are many enactments which Parliament never would and never could pass. Hence the doctrine is no better than a legal fiction. Let us examine these difficulties.

(1) **Legal and Political Sovereignty :** If "sovereignty" means the power of making laws, unrestricted by any legal limit placed on its authority, that "legal sovereignty" resides in Parliament. This is a strictly legal sense of the term. "Politically", however, the electors are the body in which the sovereign power is vested. No doubt, the present arrangements of the constitution are

such that the will of the electors shall always assert itself in the end, by regular and constitutional means at the time of election. But this is a political, not a legal fact. The Courts take no notice of the will of the electors. They will not question the validity of a Statute because it is in opposition to the wishes of the electors. It is asserted, that the members of the House of Commons are "*trustees*" for the electors, and are restricted in the exercise of their sovereignty by that trust reposed in them. This is no doubt true, but only to a particular extent. The members of the House of Commons are trustees of the electors only politically and not in a legal sense. The Courts know nothing of such trust. Thus, while the ultimate "*political*" sovereignty resides in the body of electors, the "*legal*" sovereignty resides in Parliament. The members of Parliament can enact any law, if they so desire, however opposed to the wishes of the electors, disregarding the fact that they may be turned out at the next election, if they do so. The electors, after they have elected their representatives to Parliament, have no means to restrict them in their actions until the next election. In the meanwhile, the representatives so chosen have unrestricted authority in law to exercise their sovereign power.

(2) **External and Internal Limitations :** The second difficulty is common to all sovereign persons or bodies. There are always two kinds of limitations, *external* and *internal*, (limitations both from within and without) placed upon their authority. (a) The possibility or certainty of resistance or disobedience to oppressive laws by subjects may deter even the most absolute ruler from making or altering every law at pleasure. The authority of a sovereign depends upon the readiness of his subjects to obey his orders and this readiness must always be limited. Thus the sovereignty of Parliament is limited by the possibility of popular resistance. Parliament can legally enact many laws but would not venture to do so in the teeth of public opinion to the contrary. The theoretically boundless sovereignty is thus curtailed by this *external* limit in practice. (b) The *internal* limit arises from the nature of the sovereign body itself. The historical traditions by which the character of Parliament is moulded and the circumstances under which it lives put a limit on its authority. It will not be thought prudent for Parliament to tax the colonies, with the experience of the 18th century before it.

These limits are not definitely marked and do not always coincide. The aim of representative government is to produce this coincidence; at any rate it may diminish the divergence between the two limits. The whole Stuart period teems with instances of such divergence. It was remedied by the transfer of power from the Crown to the House of Commons. The House being representative of the people, the wishes of the electorate are made to coincide with the will of the government and the divergence between the two limits disappears in the end.

105. Recent changes : It has already been stated that the sovereign

power of law-making resides in Parliament, *i. e.*, in the King, the Lords and the Commons constituting jointly one sovereign body. The share of sovereignty, possessed by the King once, has long since been curtailed and modified. Almost all the powers nominally vested in the Sovereign are now exercised by and through his ministers, who are responsible for their official acts, done in the name of the Crown, to the House of Commons.¹ The House of Lords, also, once possessed an equal share of sovereign power with the House of Commons. Since the passing of the Parliament Act of 1911, the nature of this sovereign power has undergone a considerable change, which is worth our notice. The effect of the said Act is that all power is taken away from the House of Lords in respect to all money bills. The Upper House can discuss the bill for a month but cannot prevent it from becoming a law. In respect of other public bills, the Lords can exercise a mere suspensive veto and can prevent any of them from becoming law for a period of little more than two years. Thus although the sovereignty still resides in Parliament, *i. e.*, in the King and the two Houses acting together, the share of sovereignty possessed by the House of Commons has greatly increased and that of the Lords has greatly diminished. It will be wrong, however, to suppose that sovereignty resides now only in the House of Commons. Despite the Parliament Act (1911), and without in any way contravening any of its provisions, the King and the two Houses acting together have still got power to make or unmake any law. The House of Commons, no doubt, can effect any change in the constitution, also, under the power given to it by the said Act, but at the same time the House of Lords still possesses substantial power to prohibit the passing of any act, the effectiveness of which depends upon its being passed without delay.

The power of the House of Lords is not considered by some as sufficiently effective, against hasty and ill-considered legislation by the House of Commons. It is feared that the House of Commons is likely to be easily swayed by the momentary impulses and sentimental feelings of the electors. The Conservative party is much inclined to this view-point. During the regime of the Baldwin Ministry, an attempt was therefore made (in July 1927) to introduce some reforms in the constitution of the House of Lords, so as to make it a more effective second chamber. It was asserted by them that the Parliament Act (1911) gives too much power to the House of Commons, which may prove dangerous in the interests of the nation. At present, there is no check on a party commanding a transient majority in the Commons from making fundamental changes affecting the life, liberty and property of the people, although the electors may be opposed to such changes. The essence of democracy is that while ordinary questions are settled by representatives elected by voters, the voters themselves must have the final word on all fundamental

1. See Chapter 3, paras 43 and 44.

questions. As it is, since the passing of the Act of 1911, the United Kingdom is governed practically by a single chamber. To remedy this state of affairs, Lord Fitzalan brought a resolution before the House of Lords and a three-days debate took place welcoming the measure, limiting and defining the membership of the House, without a division. A bill was to be accordingly introduced with the provisions that the number of members be limited to 300 or 350, that a large proportion of these members be elected from among and by the hereditary peers, that a certain number be nominated by the Crown on the recommendation of the Premier and that more substantial powers be given to such newly constituted chamber (Such a bill is now introduced by Lord Salisbury in the Lords and is being discussed.¹) The Labour and the Liberal parties, who are jealous of the powers of the House of Commons, strongly protested against this attempt of the Conservatives, which they allege is intended to strengthen the conservative element in the Upper House. They demanded that the powers of the House of Commons must not be curtailed unless and until the political sovereign of the State, i. e., the electorate desires to do so. As a result of the general election, (1929), the Conservative party lost office and the Labour party came into power. The question of the reform of the House of Lords, therefore, lost for sometime its practical and political importance.²

106. The Parliament Act (1911): The most important provisions of the Parliament Act (1911) are as follows :

- Sec. 1. (1) If a Money Bill, having been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.
- (2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration or regulation of taxation, the supply, appropriation, receipt custody, or issue of accounts of public money, the raising or guaranteeing of any loan, or any subordinate matters incidental thereto, but not that raised by local authorities or bodies for local purposes.
- (3) There shall be endorsed on every Money Bill, when it is sent up to the House of Lords and when it is presented to His Majesty for assent the Certificate of the Speaker of the House of Commons signed by him that it is a Money Bill.....

1. See Para 60. 2. For further discussion, See Chapter 3.

- Sec. 2 (1)** If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill. Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.
- (2)** When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the Certificate of the Speaker of the House of Commons signed by him that the provisions of this section have been duly complied with.
- (3)** A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords without amendment or with such amendments only as may be agreed to by both Houses.
- Sec. 3.** Any Certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes and shall not be questioned in any Court of law.
- Sec. 7.** Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715.

107. Extent of Sovereignty : We have already stated that the sovereignty of Parliament is not confined to the United Kingdom but extends to the British Dominions as well, except, of course, to Crown colonies. No doubt, Parliament, though theoretically omnipotent throughout the British Dominions, does not exercise its power in practice in its full effect upon any other part except the United Kingdom. The relations of Parliament to the Dominions situate beyond the seas, such as, Canada, Australia, New Zealand and the Union of South Africa (the great Dependency of British India may also be included in this category) will be discussed in the next chapter. It will suffice here to say that Parliament exercises sovereign power, though with constantly

increasing caution, over all the Dominions in all matters directly affecting Imperial interests, e. g., in waging wars or making treaties. Under a constitution granted by an Act of Parliament, each Dominion is independent but that independence is confined to local matters only. The Dominion legislatures are in fact, created and exercise powers delegated to them by Parliament. Although these legislatures have supreme authority to make and unmake laws concerning the internal affairs of the country, they are in reality subordinate and non sovereign law-making bodies, so far as their relation with the outside world is concerned. Parliament has not transferred authority to any Dominion legislature to repeal any Act of Parliament, affecting the said dominion.

108. Limited in practice: Although, in theory, Parliament still possesses supreme power of legislation in respect of self-governing Dominions, that Power is exercised with increasing caution, so as not to injure the susceptibilities of the Dominion people. Even in the matter of foreign affairs some freedom is conceded to the Dominions. The right of every Dominion to independence in internal matters has been admitted by Parliament long since. The Dominion legislatures are empowered to legislate in regard to matters solely concerning their internal interests and in some cases even the right to alter their constitution is conceded to the Dominions. During the Great European War (1914 to 1918) the practice of holding Imperial Conferences came into vogue, to consult and discuss on all matters concerning the interests and policy of the Empire. The primary object of these Conferences has been to bring about a closer union of the United Kingdom and the Dominions and to readjust constitutional relations for that purpose. There is a mutual recognition of benefits on both sides. The Dominions enjoy peace and safety from external attack under the Union Jack and the United Kingdom receives the strength and moral support from the Dominions in foreign affairs. This has engendered a new sentiment, that of uniting the whole Empire into one polity. The Imperial Conferences were summoned with this object in mind. As a result thereof the Dominions are granted some more rights. (i) In 1917, the Conference adopted a resolution recognising "the right of the Dominions and India to an adequate voice in foreign policy and foreign relations" and agreeing to "provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation as the several governments may determine." (ii) in 1919, the Peace Treaty was signed by the representatives of the Dominions and of the Government of India, thus giving them, though only nominally, a status in foreign affairs. (iii) In 1923, the Conference resolved that henceforth "in the negotiation of international treaties, the Dominions and India should be separately represented." By the same resolution, each Dominion was accorded the right of concluding independent treaties on matters which concerned itself only, subject to the granting of full power to its representatives by the Home

Government. This, however, does not mean that the Dominions have an absolutely unrestricted and unfettered right to make a foreign treaty. (iv) A special Committee consisting of the Prime-Ministers of the United Kingdom and the Dominions together with the representatives of the Government of India presided over by Lord Balfour was appointed to consider the machinery to give effect to the independent status of the Dominions in foreign affairs. The report of that Committee (1926) made a declaration of full autonomy, while at the same time left the essential unity of the Empire unimpaired. We will consider the possibility or otherwise of establishing any such machinery in a subsequent chapter. One of these Conferences was held in 1930 to consider the operation of Dominion Legislation and Merchant Shipping Legislation. The recommendations of the said two Conferences of 1926 and 1930 were framed with the object of "carrying into full effect the equality of status established at the root of the principle governing the relations between the members of the British Commonwealth and indicating methods for maintaining and strengthening a practical system of free co-operation." One of these recommendations was that "the power of the Crown to disallow or veto Dominion legislation on the advice of the Ministers of the United Kingdom cannot any longer be exercised." To this effect it was recommended by the Conference that an Act be passed by Parliament affirming that Dominion Parliaments are fully empowered to make laws having extra territorial operation. Another far-reaching recommendation of the Conference was that "inasmuch as the Crown is the symbol of the free association of the members of the Commonwealth, a convention should be framed laying down that any alteration of the law touching on the succession to the Throne or Royal Style and Titles shall hereafter require the assent of the Parliaments of all the Dominions as well as the Parliament of the United Kingdom."

109. Statute of Westminster :¹ As a result of the various resolutions passed by the Imperial Conferences held in 1926 and 1930 and to give legal sanction to the same, the Statute of Westminster, 1931 (22 Geo. V, ch. 4) was passed by the British Parliament. It lays down mainly that (i) any alteration in the Law, touching the succession to the Throne or the Royal Style and Titles shall hereafter require assent of the legislatures of all the Dominions; (ii) no law hereafter made by the British Parliament shall extend to any of the Dominions as part of the law of that Dominion, otherwise than at the request and with the consent of that Dominion; and (iii) the Parliament of a Dominion has full power to make laws having extra-territorial operation. It will be evident, that this Act limits the extent of the Sovereignty of the British Parliament so far as the self-governing Dominions are concerned and almost reduces it to a nullity.

110. The Case of Newfoundland : However, with the consent of the

1. For further details see Part I, paras 84 and 142-143, pp. 41 & 66.

Parliament of a particular Dominion, the British Parliament can, at any time, again assume full legal sovereignty, with respect to that Dominion. Owing to financial difficulties engendered by a vicious and corrupt political system, it became impossible to carry on the government of Newfoundland and a Royal Commission was appointed to enquire into the matter and make necessary recommendations. The Commission's recommendations were accepted by the British Parliament, and at the request of the said Dominion, an Act was passed by the former, placing the latter outside the Statute of Westminster. The Act received Royal assent on 22nd December, 1933. Under the said Act, the administration of the island will now be carried on under the general supervision of the Secretary of State for Dominions. The Governor is invested with full legislative and executive powers and will act on the advice of a special Commission of six members appointed by the King on the advice of British Ministers. The King is empowered to disallow legislation. It is understood that the Act is an *interim* measure and the Statute of Newfoundland would be restored within a short period.

CHAPTER VI

NON-SOVEREIGN LAW-MAKING BODIES

111. The three chief characteristics of the English Constitution as contrasted with those of the constitutions of either the British Dominions or other independent countries are that (1) it is *unwritten*, (2) it is *flexible* and (3) it is *unitary*. And the chief characteristic of the British Parliament, as we have already seen,² is its sovereignty. We will now proceed to study the characteristics of the constitutions and legislatures of other chief countries of the World and compare and contrast them with the characteristics of the British constitution and British Parliament.

112. Unwritten and written : Unlike the British constitution, which is *unwritten*, in the sense that it was not formulated at any one time and cannot be gathered from any one document, the constitutions of other countries are *written*. They were formulated and adopted at one time and can be gathered from one document as a whole. To find out what the constitution requires in respect of any particular matter, one has to look into that single document and interpret the provisions laid down there. In short, that document is an immutable law of the land. It is not so with the British Constitution. It cannot be gathered from any one document and much of it is not in written form at all.¹

113. Sovereign and Non-sovereign Bodies : (1) The chief characteristic of a constitution with a sovereign Parliament is, that it is *flexible, i. e.,* the

1. See ch. 2. 2. See ch. 5.

Parliament is at once a *legislative and a constituent body*. It can make laws to change the basis of the constitution with the same ease that it can make any other ordinary law. As a consequence of this flexibility, three important results follow: (a) Parliament acting in its legislative capacity can make or alter both constitutional and ordinary laws. An Act to reform or reconstitute either House and an Act to permit a railway being built are on the same footing and may be passed in the same manner. (b) In the powers of such a sovereign body there is no distinction between constitutional and ordinary laws. The constitution as a whole is never reduced to writing because it is changeable at the will of Parliament. No particular sacredness or immutability is ascribed to the rules of the constitution; they can be modified, expanded, amended or abolished with equal ease as any other law. It does not require any extraordinary mode of legislation for that purpose. It must not be supposed, however, that the whole law of the constitution cannot be reduced to writing in the form of a code. And, such a code can be equally kept flexible to be altered or modified at the will of Parliament, as at present. (c) No person or body of persons in the British Empire can question the validity of any enactment passed by Parliament on any ground whatever. There exists no authority judicial or otherwise, that can sit on judgment on the constitutionality or otherwise of the Acts of Parliament and declare them void or unconstitutional. These three points make up the quality, known as the flexibility of the British Constitution and distinguish it from the *rigid* constitutions of other countries.

(2) The law-making bodies, under the rigid constitutions, are the exact opposite of a sovereign body, in the matter of these three characteristics and that is why we call them non-sovereign law-making bodies. (1) These bodies are created by a written constitution formulated at one time, which they have to obey but cannot change. In effect, the constitution of such bodies is *rigid* and can be changed only by some extraordinary method. (2) A marked distinction is always observed between the fundamental or constitutional laws which affect such bodies and the ordinary laws which they are empowered to make or unmake under the authority of that constitution. (3) There always exists some authority, under the constitution, which keeps a vigilant watch on the enactments of these bodies and pronounces upon their constitutionality or otherwise, whenever such a decision is required.

So far we have discussed only two fundamental characteristics of the British Constitution, *viz.*, its unwritten character and its flexibility. In both these particulars the constitutions either of the British Dominions or of other independent countries differ from it. The third characteristic is that the British constitution is unitary, in the sense that all power is concentrated in the hands of the sovereign Parliament and that there is no other co-ordinate or conflicting authority to question its acts, unlike the Federal constitutions of some countries which stand in sharp contrast to it, in that respect. It will be more convenient

to deal with the more prominent unitary and federal constitutions in separate chapters.

114. Two classes of Non-sovereign Bodies : The non-sovereign law-making bodies can be divided into two separate classes. These classes are : (1) subordinate law-making bodies and (2) non-sovereign legislatures.

115. (1) Subordinate Law Making Bodies : (a) *Corporations.* Municipalities or railway companies are instances of such corporations. They are created by an Act of Parliament. They are empowered by the Act creating them to make laws, *i.e.*, bye-laws or regulations for the conduct of their own business. For instance, a railway company may be empowered to make regulations for travelling on its line. The public travelling on the line as passengers will be bound by such regulations and may be liable to pay a penalty imposed by the company for breach of such regulations. The company will be entitled to enforce these regulations against its passengers by proceedings in the Courts and the Courts will treat such regulations in all respects as laws. Thus, these corporations possess legislative power, but they are non-sovereign law-making bodies. Their legislative authority is subordinate to that of Parliament in three ways : (1) A corporation has to obey all laws and particularly the Act of Parliament which creates it. It cannot change that Act, or for the matter of that, any law by its regulations. The sovereign Parliament, on the other hand, can change its constitution at will, and has not to obey any law passed by any other authority outside it. (2) Thus there is a marked distinction between the Act constituting the corporation, *i.e.*, its constitution and the bye-laws or regulations which it is empowered by that Act to make or unmake. The said Act can only be changed by the sovereign Parliament that enacted it. Hence, a corporation, though a law-making body is not a constituent body. (3) Again, there is an outside authority, *viz.*, the Courts empowered to pronounce upon the constitutionality, and hence, upon the validity of such bye-laws or regulations. If a case comes before the Courts, which depends upon a bye-law or regulation of a corporation, they are bound to decide whether the said bye-law or regulation is or is not within the powers conferred upon the corporation by the Act of Parliament creating it. In short they have to judge whether a particular bye law or regulation is or is not valid for the purposes of that particular case before them. The Courts, however, cannot go further than this; they cannot affirm or annul the bye law or regulation itself. It can be declared void and annulled either by the corporation itself under a power given to it or by Parliament.

116 (b) Legislatures of British India : The Indian legislatures situate either in the Provinces or at the Centre are likewise subordinate law-making bodies. No doubt, they have wide powers of legislation. (1) Apart from the fact that their laws can be disallowed by the Crown, the authority which these legislatures possess, is derived by them from and is subordinate to

the Acts of Parliament. These Acts impose upon them rules which can only be changed by Parliament (2) These Acts form a set of constitutional laws for India and stand in marked contrast with the laws made by the Indian legislatures under the power given to them by these fundamental Acts. Various restrictions are imposed upon Indian legislatures by these Acts as to the nature of laws that they may enact; in particular, they are prevented from making laws which may affect the authority of Parliament or any part of the British Constitution, "whereon may depend in any degree the allegiance of any person to the Crown" or "the sovereignty or dominion of the Crown over any part of India." (3) Any Court in India or in any other part of the British Empire is empowered to question the constitutionality and validity of the enactments of the Indian Legislatures, while deciding a particular case brought before them. They, however, cannot declare them void or annul them directly. In this connection, they will be treated by the Court like the bye-laws of a corporation.¹

117. (c) Legislatures of British Dominions: These law-making bodies stand on a slightly different footing than those discussed above, inasmuch as some of them are even empowered to change their constitution. (1) But all the same, they are subordinate legislative bodies, because they are all created by Acts of Parliament and their legislative power is derived from such Acts. (2) These Acts, which create them, define their powers and stand apart from the laws they make. In the case of New Zealand, for instance, Parliament has authorised the Colonial legislature to change the articles of its constitution. But as this power is derived from the Act of Parliament, it does not impair in any way the legal sovereignty of Parliament. That authority can as well be revoked by Parliament at any time. Thus the New Zealand Parliament is at once a subordinate and a constituent assembly. This also shows that a written constitution need not always be immutable as is supposed by some writers. The legislatures in other Dominions which are not empowered to change their constitution are only subordinate law-making bodies, without being constituent bodies, also, at the same time. (3) The constitutionality and validity of the laws made by these legislatures can be questioned by any Court within the British Empire and more particularly so by the Court of the Dominion to which that legislature belongs. While pronouncing upon the validity of these laws the Courts have to apply the rules of test laid down

1. The case of *Emperor V. Burah* illustrates the principle laid down here. The High Court of Calcutta allowed an appeal from two prisoners on the ground that the law applied was enacted by the Governor-General in Council in excess of the authority given to them by Parliament and was therefore void. On further appeal, the Privy Council was of opinion that the law in question was within the powers conferred upon the Indian Legislature by Parliament, and therefore valid. The Privy Council, however, did not question the authority of the High Court to enquire into and pronounce upon the constitutionality and validity of a particular law as applied to a given case before it.

in the Colonial Laws Validity Act of 1865. These tests are: (i) When a colonial law is repugnant to the provisions of any Act of Parliament extending to that colony or any order or regulation made under the authority and having the force or effect of such Act, it is void and inoperative to the extent of such repugnancy. (ii) A colonial law is not void or inoperative merely because it is repugnant or opposed to the English common law; it must not be repugnant to or inconsistent with any Act of Parliament, order or regulation, as aforesaid. The Courts will keep aside the colonial law in such cases as if it does not exist and give effect to the Act of Parliament or an order or regulation made under the authority of such Act. This is an inevitable result of the legal sovereignty of Parliament. (iii) Instructions from the Crown except those contained in Letters Patent issued to the Governor in relation to any Colonial law, do not invalidate that law, if passed with the concurrence of the Governor. (iv) The Colonial Law must always be passed in such manner and form as required from time to time by any Act of Parliament, Letters Patent, Order in Council or Colonial Law in force for the time being. Thus, the Colonial Legislatures, although they are sovereign bodies within their own spheres, their freedom of action is circumscribed and controlled by the sovereign Parliament of the United Kingdom.

118. Colonial Legislative Freedom and Parliamentary Sovereignty : How is Colonial legislative freedom made compatible with the legislative sovereignty of Parliament? Although it may sound paradoxical to say that the legal supremacy of Parliament is the chief cause of the wide power allowed to Colonial Legislatures, it is nevertheless true, because, the constitutions of these Colonies depend upon Acts of Parliament and the same can be altered or repealed by the latter body. Similarly, Parliament can legislate for the Colonies at any moment. If a Colonial Act contravenes an Imperial Act, it is legally void. If a Colonial Act does not contravene any Statute, but is opposed to the interests of the Empire, Parliament can pass an Act and render the former ineffectual. But that course is rarely taken. In practice, the Crown's veto is frequently exercised over such undesirable Colonial enactments. This is done in four ways: (a) The Governor of a Colony, as King's representative, may directly refuse the assent. (b) The bill may be reserved for the consideration of the Crown. If Royal assent is refused or the statutory period of two years expires and still it is not given, the bill lapses. (c) A clause may be inserted in the bill to the effect that it will not come into operation until the signification of Royal assent. Under these three forms of the exercise of veto, a measure passed by a Colonial Legislature never comes into operation in the Colony as law. (d) Although the Governor has given his assent the Crown may subsequently refuse it. The Governor's assent is not final and conclusive. Under this mode the Colonial Law which has already come into operation may be disallowed by the Crown from the date of such disallowance. This Royal assent in

*effect means the assent of the English Ministry and therefore indirectly of Parliament.*¹ This ultimate supremacy of Parliament obviates the necessity for carefully limiting the power of Colonial Legislatures. The use of the Crown's veto prevents conflict between Colonial and Imperial Laws. Besides, treaty-making power resides in the Crown and all Imperial treaties are legally binding on the Colonies. No Colonial Legislature can make treaty with any foreign power. To appreciate the nature and extent of this control two points must be kept in mind. In the first place, as a matter of policy, Parliament interferes less with the action of the Colonies. Secondly, although a Colonial Act is given Royal assent, it will be declared void, if found repugnant to any Act of Parliament applying to the Colony.

119 Objections Examined : Before we leave the discussion of this subject of subordinate law-making bodies, it is worth our while to examine the objections advanced by some writers for grouping together such bodies as corporations with Indian and Colonial Legislatures under one and the same caption. No doubt, in very many material particulars corporations differ from legislatures, however subordinate they may be. They differ very widely in their sphere, of action and especially in the number of individuals affected by their measures. (1) However there is nothing absurd or ridiculous if we put a railway company and an Indian Legislature in the same group, for the purpose of comparing their common characteristics. If two widely different things have some points in common, these may be made clear by such comparison. A logician is never called absurd or ridiculous, if he compares a human being with birds and calls him a "featherless biped." He does not mean to say, and no reasonable man thinks he wants to say, by such comparison that a man is in all respects like a bird. He is only comparing them from the viewpoint of their common possession, *viz.*, two feet. (2) It is asserted by some that the powers of a corporation can generally be exercised only reasonably and that its bye-laws or regulations will be invalid if they are unreasonable. According to them this is not true of the laws made by a legislature. Why this is presupposed, one fails to understand. Both corporations and legislatures are composed of human beings and one is as likely to err and become unreasonable as the other. It is a matter of common knowledge and experience that both corporations and legislatures sometimes do enact measures which may be called unreasonable. But such measures are not necessarily invalid. Unless a measure directly contravenes or is in excess of the power under which it is enacted, it will not be declared invalid by a Court of law, although it thinks it to be unreasonable, whether the same be enacted by a corporation or a legislature. The measures of both these bodies partake of the nature of laws and that is the sole point of comparison between them. (3) And, it is not true to say that the bye-laws or regulations

¹ See the recommendations of the Imperial Conference (1930) in this connection ; ch 5, para 108,

of a corporation are not laws because they affect a very limited number of persons in comparison to laws of a subordinate legislature which affect the whole country or a province. The difference is merely of degree. It is asserted by some that the bye-laws of a railway company affect their passengers in addition to the general law of the land to which they are subject, whereas the laws of a legislature constitute the general law of the country, over which that legislature has jurisdiction. Those who advance this argument seem to forget that the people of a country possessing a subordinate legislature also bound in addition to the laws of their own legislature by the Acts of Parliament which created that legislature. In reality, the passengers of a railway company and the inhabitants of a country with a subordinate legislature are subject to two sets of laws and that is why the comparison is real.

120. (2) Non-Sovereign Legislatures : (a) French or Belgian Legislatures: Foreign countries like France and Belgium are independent sovereign states, but a detailed examination of their legislatures shows that though apparently sovereign assemblies, they are non-sovereign law-making bodies. Both the constitutions are mainly based on the distinction between constitutional laws and other ordinary laws. (i) Under the various constitutions, France had from time to time, this distinction existed. Even the present Republican constitution lays down that a certain number of laws cannot be changed by its ordinary Parliament of two Houses, *viz.*, the Senate and the Chamber of Deputies. That supreme legislative power of changing the constitution is vested in the joint body composed of the Senate and the Chamber of Deputies sitting together and forming what is known as the "National Assembly." It is a "rigid" constitution and not a "flexible" one, like that of the United Kingdom, under which the rules of the constitution can be changed as easily as ordinary laws. A rigid constitution requires a special machinery or arrangement for a change in the articles of the constitution, which are otherwise held to be sacred and immutable. Of course these articles do not always refer to matters of paramount importance. While the French constitution makes provision for this special machinery, it is strange that it does not contain a single article providing against the possibility of the ordinary Parliament enacting laws in excess of the powers conferred upon it by the constitution. Any enactment passed by that Parliament and promulgated by the President becomes law and will be held valid by all the Courts throughout the country. The rules of the constitution which the said Parliament is prohibited to change are not in reality laws so as to be enforced by the Courts in the last resort, and any ordinary law infringing or contravening these rules will not be declared unconstitutional or invalid by them. The true character of these rules is that they are maxims of political morality. Their main strength lies in the fact that they are formally included in the constitution and are supported by public opinion. (ii) The constitution of Belgium is likewise

a rigid constitution inasmuch as the ordinary Parliament is prohibited from changing them by ordinary methods of legislation. The constitution provides a special machinery for such change. But this constitution also, like that of France, does not make provision for invalidating ordinary laws passed by Parliament in excess of its authority. In theory, no doubt, it is asserted that an Act of Parliament opposed to any article of the Constitution will be treated as void by the Courts. But so far there is not a single instance of the Courts having ever pronounced upon the constitutionality and validity of any law passed by that Parliament. The restrictions on the scope of its authority are mere constitutional understandings, not laws, so as to be enforced by the Court and are mainly supported, as in France, by moral or political sentiments of the people.

121. (b) American Legislatures. Unlike the French and Belgian constitutions, the constitution of the United States of America makes provision for pronouncing upon the validity or otherwise of the laws enacted by either State or Federal Legislatures. The constitution provides a special machinery for the change in its rules and prohibits the ordinary legislatures from doing so. Such changes are to be proposed by the Congress, *i. e.*, the Senate and the House of Representatives with the approval of two-thirds majority in both Houses or by a general convention of two-thirds of the State Legislatures summoned on an application to the Congress. The changes so proposed must be ratified by three-fourths of the State Legislatures before they can be finally adopted. The State Legislatures or the Central Legislature cannot make laws which are in excess of the authority conferred on them by the constitution. If any such law is passed, the Central Judiciary, which is constituted the sole arbiter of the constitution, is empowered to pronounce upon its constitutionality and validity and to treat it as void. It will be clear from this that the American constitution is a rigid constitution and the legislatures constituted under the authority of the same are non-sovereign law-making bodies.

122. Merits and defects: Both the flexible and rigid constitutions have their merits as well as defects. A flexible constitution can be changed at will as circumstances may require. Revolution and bloodshed may therefore be averted and avoided. At the same time there is a danger that a transient majority in the legislature may make such changes in the constitution as might endanger the fundamental rights of the nation. The rigid constitution, on the other hand, puts a strong check upon hasty and ill-considered changes in the fundamental rights of citizens. At the same time, it checks gradual innovation required by changing circumstances and thereby provokes revolution. A question may well be asked: Does the rigidity of a constitution secure its permanence or immutability? History gives an indecisive answer to this query. While, on the one hand, the rigid constitutions of countries like Belgium or the United States have endured for more than half a century or a

century respectively, without any material change, the twelve so-called unchangeable constitutions of France, on the other hand, have each lasted on an average for less than ten years. The flexibility of the constitution has transformed English polity within sixty years and averted a revolution, while its rigidity in France has undermined the foundations of the State and provoked frequent revolutions. Hence, historically it cannot be said decisively that the rigidity does always ensure permanence.

123. Two Safeguards: Our discussion of the rigid constitutions makes it clear that there are two methods by which a rigid constitution can be safeguarded against unconstitutional legislation: (1) The reliance placed upon the force of *public opinion or sentiment* is one of them. This method is adopted by France and its Continental followers in restraining the legislature from passing unconstitutional measures. They have laid down maxims limiting the spheres of their legislatures. To restrain the latter from making inroads upon the former, they trust to public sentiment or political considerations. They have not provided any special machinery to bring to book the unconstitutional enactments of these ordinary legislatures. The result is that constitutional restrictions placed upon the legislature are not in reality laws, since they cannot be enforced by the Courts. They are merely constitutional understandings or maxims of political morality, deriving their strength from public opinion. (2) Another safeguard is to give *authority to a person or body of persons*, preferably to the Courts, to adjudicate upon the constitutionality of ordinary legislative enactments and to declare them void if inconsistent with the rules of the constitution. This course is safer and surer and is followed by the authors of the American constitution. This sort of contrivance helps to nullify the effect of unconstitutional enactments of non-sovereign legislatures.

124. "Unconstitutional": Three different meanings: We may also make clear here the meaning of the word "unconstitutional". It is employed in three different senses according to the nature of the constitution under the rules of which a particular law is declared "unconstitutional." (1) Under the British constitution, an Act of Parliament, if declared unconstitutional, means that it is "opposed to the spirit of the constitution." But no authority can declare it void. (2) Under the French constitution, an Act passed by French Parliament, if in excess of its authority, means that it is "opposed to the articles of the constitution." However, no Court will refuse to enforce it and hence it is not void. The word "unconstitutional" in these two cases, is merely a term of censure. (3) Under the American constitution the word has a definite meaning. An Act passed by the Congress in excess of its authority is simply "void." The Courts will refuse to enforce such a law and will declare it void.

CHAPTER VII

UNITARY CONSTITUTIONS

I. France

125. Constitution: After the famous Revolution in France, various attempts were made at constitution-making between the years 1791 and 1875. The present constitution, adopted in 1875 is the product of compromise between the Republicans and the Monarchists. It is a brief, partial and unsystematic document, rather a set of three separate documents. It does not cover all the ground that a written frame of government is generally expected to cover. It contains no general bill of rights, nor, indeed, any specific guarantees of the rights of the citizens as against the government. It also does not say how the members of Parliament shall be elected. And, it leaves the judiciary, too, almost untouched.

126. Amendment: For any amendments of the constitution the initiative may come either from the President or from either branch of Parliament. The suggested changes are first considered by the two Houses separately. If both Houses decide by an absolute majority of their members, that a revision is desirable, the members of both Houses meet in one '*National Assembly*', in which amendments can be carried by absolute majority. Thus a special arrangement is provided for constitutional changes. It was devised with a view to make it somewhat difficult to make changes in the fundamental law, which is considered sacred. This is evidenced by the special restriction placed in 1884 upon the National Assembly itself. Even that body is forbidden to make the republican form of government a subject of proposed revision. Of course, the restriction is at its best a gentleman's agreement rather than an insurmountable restraint. What one sovereign body, in this case the National Assembly, has done cannot bind for all time and can be undone by another equally sovereign body.

127. Changes by ordinary Laws: Although the amending power is used sparingly, changes in the governmental system are freely and easily made by ordinary laws. Without formally amending the constitution, Statutes, such as electoral laws, which can be called strictly constitutional laws, are freely enacted. Such Statutes are termed '*organic*' Acts.

128. Comparison: The discussion, so far, shows that the constitution in France, like that in England, is at the mercy of Parliament. The people in

both countries have tacitly surrendered the exercise of constituent powers to their legislatures. The procedural distinction in France, no doubt, may act as a restraint; otherwise the situation is the same in both countries. Even the tradition which is now growing up in England, that no great constitutional change shall be made until the people have an opportunity to express themselves upon it at a general election, does not exist in France.

129. Executive: President: The most fundamental function of government is the execution of law and it is essential that ample provision for the exercise of executive power by some continued authority, is made. In France, the elected President is the head of such executive. (a) He is *elected* for a term of seven years "by an absolute majority" of votes of the Senate and the Chamber of Deputies united in the "National Assembly." (b) The *qualifications* for the post are not laid down in the Constitution. It is understood that a male French citizen, twenty-one years of age or above and in possession of full civil and political rights, is eligible. In practice, a man, who has long been a member and has perhaps served as President of one or the other of the two Houses of Parliament, has had experience in committee work as a cabinet officer and is not too aggressive or domineering in temperament, is more likely to be elected than anybody else. He is also eligible for re-election immediately and indefinitely (c) *Responsibility*: He is not responsible to the legislature. Every act of the President should be countersigned by a Minister and the Ministers are collectively responsible to the legislature for the general policy of the Government and individually for their personal acts. He is, however, responsible for treason, and may be impeached by the Chamber of Deputies and tried by the Senate. In this respect, his position is like that of the President of the United States, to a certain extent. While the former is liable for treason only, the latter is liable also for bribery and other high crimes and misdemeanours. (d) *Powers*: His powers are wide and many, but only theoretically, like those of the King of England; in practice, his powers are exercised mainly by Ministers over whom he has little or no effective control. In theory, he has full executive authority. He promulgates the laws and controls the administrative machinery through which they are enforced. He appoints civil and military officers and removes them. He negotiates and approves certain treaties. He is commander-in-chief of the naval and military forces. He has also the powers of pardon and reprieve. •

130. The Ministers are the real executive. (a) *Responsibility*: As is already stated, every act of the President is countersigned by a Minister and they are all collectively and individually responsible for their policy and their acts to Parliament, *i. e.*, both Houses and the nation, unlike the British Ministry, who are responsible only to the Lower House. The responsibility, of the French Ministry is of three kinds: (i) *Political* responsibility, which is collective, consists in the moral obligation to resign office when the support

of a Parliamentary majority has been lost. (ii) *Penal* responsibility is the legal liability of a Minister, who, in the exercise of his functions, has performed an act defined and prohibited by the Penal law. (iii) *Civil* responsibility is his liability for an act by which the State is made to suffer, *e.g.*, an unauthorised disbursement of public money. They lead and control legislation and they make all appointments to civil and military offices. They are not responsible to the President, although he sits and presides over the Ministry at its frequent meetings for the consideration of executive business. He does not, however, attend the sessions at which questions of political policy including party affairs are discussed. (b) The number of Ministers to be appointed is not definite; the Constitution is not explicit on this point. The decision generally rests with the Ministers; they can increase or reduce the number of portfolios and alter the distribution of functions at will, except, in so far as they must look to Parliament for necessary funds. These Ministers are essentially co-ordinate and present an aspect of symmetry, which is altogether lacking in the British Ministry. They include all of the regular administrative services. (c) *Appointment*: The President under his general power of appointment names the Premier, when a new ministry is to be selected; and the decree for the same is countersigned, curiously enough, by the retiring Premier. By convention, the President has to call in the recognised leader of the majority in the Lower House, but there being numerous parties, it is difficult to find a man, who can succeed in bringing together a Ministry, that will command majority support. Hence, the President exercises far more discretion and power in the selection of the Premier than the King of England. The Premier in his turn selects other Ministers and assigns them their posts. Through the distribution of portfolios among a certain number of groups, so that, each member will bring to the support of the Cabinet a body of adherents, he succeeds in creating a majority. The Ministers may be drawn from either House, but whether members or not, they are entitled to attend all sessions of both Chambers and to take a privileged part in debate.

131. Parliament: The French Parliament consists of two branches, *viz.*, the Senate and the Chamber of Deputies. (1) *The Senate* consists of 300 members distributed among the *departments* (something like our districts-geographical divisions) in approximate proportion to population and chosen in all cases by bodies of electors all of whom have themselves been elected. Election is thus indirect. Their term is nine years, one-third of the seats falling vacant every three years. All this is provided by the constitution.

(2) *The Chamber of Deputies* is composed of over 600 members, the number varying with the growth or otherwise of population. The Constitution beyond providing that the members of this body "shall be elected by universal suffrage, under conditions determined by the electoral law", does not say anything further and the details are therefore worked out by ordinary legisla-

tion. The electoral law extends franchise to all men of the age of 21, who are not bankrupts, under guardianship or in active military or naval service and who have not by judicial condemnation lost their civil and political rights. No educational or property qualifications are required. Women are not yet given right of voting. The country is divided into districts (*communes*), in one of which where he has been a resident for six months, the voter has to get his name registered. The members are elected for a four-year term. They must be voters themselves and not less than twenty-five years of age. Residence in the constituency they represent is not necessary.

132. Sessions: The Constitution provides (i) that Parliament shall assemble annually on the second Tuesday of January, unless convened at an earlier date by the President; (ii) that both Houses shall continue in session through at least five months of each year; and (iii) that the sessions of both Houses shall always begin and end at the same time. The second of these requirements does not compel Parliament to actually sit, even if there is no business; it only means that they have a right to sit so long, and the President cannot adjourn the Houses to deny them that right. The President convokes all extraordinary sessions, closes all sessions and also adjourns the Chambers subject to the limitation just mentioned. He has also the power to dissolve the Lower House, with the consent of the Senate. The power to prorogue does not exist.

133. The Members of Parliament represent not only their own constituency individually but the whole nation, which expresses its will through the electorate, and thus the elected Chambers become the organ of the sovereign people. Each House is judge of the qualifications of its members and has complete control over the continuance of a member in its ranks. A member who accepts a salaried office automatically vacates his seat in the Chamber, though not in the Senate. Exception is made in favour of deputies who become Ministers or Under-Secretaries; they continue to be members and are not even required like British Ministers to seek re-election. Every member enjoys entire freedom of speech and voting and he cannot be prosecuted or arrested for any crime or misdemeanour except upon the authority of the House of which he is a member. Every member receives an annual salary of 15000 francs and, in addition, is entitled on payment of a nominal sum to travel free on all French railways.

134. Procedure : 1. *Bureaus :* At the opening of each regular session, the Chamber of Deputies is divided by lot into eleven bureaus of about 57 members each and the Senate into nine bureaus of 33 or 34 members each. A new distribution takes place every month while the session lasts. Each bureau names its own president and secretary. (2) *The President* of the Senate ranks second and the President of the Chamber of Deputies ranks third, among the dignitaries of the State, the first being the President of the

Republic. They perform the functions of a moderator during debate, but can quit the chair to participate in debate. They represent their Chamber on ceremonial occasions, in its dealing with the other Chamber, and with executive authorities. (3) *Bills* or other proposals are first considered in a bureau, where they discuss the general principles involved. Then each of the eleven or nine bureaux chooses by ballot one of their members. These eleven or nine members so chosen form a Committee for more detailed scrutiny of the proposal. In the case of an important measure the House may ask the bureau to designate two or three representatives each.

135. The functions of Parliament are threefold. (1) *Legislation:* Each House adopts by resolution at the beginning of a session the rules under which it proposes to work during that session. The President as well as members are entitled to initiate bills. As a rule, measures initiated by the President are in reality of the Ministers. They may as well be presented by the Premier or some other Minister. A private member's bill must pass the scrutiny of a special Committee, whose report furnishes the House the basis for discussion as to whether it will take the proposition for consideration. If the decision is in the negative, the bill cannot be re-introduced within six months; if it is in the affirmative, the bill follows the same course as a government measure. By this individual initiative much valuable time is wasted and the modern tendency is to restrain the same. The government bills are referred in the Senate to bureaux and through them to special Committees; they are similarly referred to the Chamber of Deputies but if they relate to specified subjects they go to the Standing Committees instead. Reports of Bureaus and Committees are printed and supplied to members, before the debate in the House begins. A measure must pass two readings in each Chamber. The two Houses are equal in dignity, power and function and each of them can adopt, reject or amend any measure that comes to it from the other. A bill to become law must pass both Houses in exactly the same form. If it passes in somewhat different form, some means must be employed to bring the Houses into agreement. If it is a government bill, the Ministers in charge of it can readily pass from one Chamber to another, winning a concession here and inducing a surrender there, until at last the difference is ironed out. If the Ministers do not care for the fate of the bill, it is referred to a Special Joint Committee, in the event of disagreement between two Houses.

(2) *Fiscal control:* The power of the purse is primarily with the Lower House. The Constitution requires that all finance bills shall be considered first in the Lower Chamber. However, measures entailing expenditure, e. g., an old age pension law, sometimes make their first appearance in the Senate. The budget is voted every year, allocating in detail the anticipated revenues to particular services, leaving the executive and the administrative authorities very little discretion in the matter.

(3) *Supervision of the executive*: The third main function of Parliament is to enforce the principle of Ministerial responsibility. In practice, this means the ceaseless supervision of and interference in the routine of administrative work. In England, the Cabinet gets free scope in administrative matters. In France, Parliament generally interferes in the matter of appointments and promotions, issues orders and meddles in affairs that do not properly concern it. Even in trivial matters Ministries are thrown out and that is why they are less stable than in England.

136. The Judiciary: (i) With one exception the Constitution makes no provision for the judicial system; it depends entirely upon Statute. The exception is the Senate which is constituted a High Court of Justice for the trial of impeachment cases and of cases involving attempts upon the safety of the State. (ii) Another feature of the French judiciary is the maintenance of two entirely separate sets of tribunals, one for the trial of ordinary civil and criminal cases; the other for the handling of controversies between the administrative authorities and private individuals. (iii) Civil and criminal cases, although the rules of procedure differ, are heard and determined by the same Courts not by separate Courts. This is, however, so far the lower Courts are concerned. The superior Courts, are as a rule, divided into civil and criminal Chambers. (iv) The Courts again are stationary and not moving like those in the United States. (v) The Courts, except, those held by the Justices of the Peace, are composed of several judges and no judgment is valid unless concurred in by at least three members of the bench.

137. (a) The Ordinary Courts comprise civil, criminal and commercial tribunals. (i) At the bottom of the structure stands the Court of the Justice of the Peace. (ii) Then comes the Court of First Instance or the District Court, with three judges at least in each Court. It is known as a 'Correctional Court' when it handles criminal matters. (iii) Above these Courts are twenty-five Courts of Appeal, each with a definite territorial jurisdiction and divided into Chambers, each consisting of a president and four judges. They hear appeals in civil and criminal cases from the District Courts. Original jurisdiction is limited and incidental. (iv) Every three months a Court of Assize is set up consisting of a specially designated member of the Court of Appeal and two other magistrates, chosen, either from the same Court or the District Court. This Court is assisted by a jury of twelve men. (v) At the apex stands the Court of Cassation, the supreme tribunal of the State sitting at Paris. It consists of a first president, three sectional presidents and forty-five judges. It is divided into three sections, *viz.*, Court of Petitions, Civil Court and Criminal Court. Their function is to review the decisions of any tribunal in the country, save those of an administrative character. It decides upon the principles of law involved and upon the competence of the original Court. It can either confirm or quash the decision; it cannot substitute a new one and

refers the matter back to a tribunal of the same grade as the original one, whose decision is amended

138. (b) The Administrative Courts: Under all forms of government the dealings of the administrative officers with private citizens give rise to many disputes, e.g., a policeman runs down an innocent person while in pursuit of an offender and the citizen claims redress. The individual officer or the Government he represents may or may not be liable according as the rules of administrative law prescribe or allow. The administrative law may be defined as a body of legal principles by which are determined the status and liabilities of public officials, the rights of private citizens as against these officials and the procedure by which these rights and liabilities may be enforced. The idea underlying it is that the Government and its agents have rights, privileges and prerogatives differing from those of the private citizens and that the nature and extent of the same are to be determined on principles essentially distinct from those that govern the relation of citizens *inter se*. In English-speaking countries the function devolves upon the ordinary Courts of Justice. In countries whose jurisprudence is based on Roman Law, a separate system of Courts is set up for the handling of cases of an administrative nature. These administrative Courts play an important role in France. Although originally designated in the interest of the Government rather than of the citizen, their primary object to-day is the protection of the individual against arbitrary or illegal administrative acts. (1) In every *department* (district) there is a *Prefectural Council*, presided over by the Prefect. It is appointed by the President of the Republic and in addition to adjudicating administrative disputes, advises the Prefect on executive or administrative matters. (2) The Appeal Court is the *Council of State*. It is the supreme tribunal for the adjudication of administrative disputes. Members of this Court are appointed by executive decree with the advice and consent of the Ministry and can be removed only in the same manner. It considers and replies to all questions relating to the administrative affairs, submitted to it by the Government and in all administrative cases, it is the Court of last resort. Experience shows that these Courts preserve a high degree of independence and the Government does not seek to extort favourable decisions. (3) When there is a conflict of jurisdiction between the ordinary and administrative Courts, the question is decided by the *Court of Conflicts*. It is composed of the Minister of Justice as *ex-officio* president, three judges each of the Court of Cassation and of the Council of State and two judges chosen by these seven foregoing members.

139. (c) The Senate: In England, the House of Lords acts as the highest Court of Appeal. The Senate in France is also empowered by the Constitution to try certain important cases. The President of the Republic and the Ministers can only be impeached before the Senate at the instance of the Chamber of Deputies for crimes committed in the exercise of their functions.

The Senate also acts as a High Court of Justice in cases involving alleged attacks on the safety of the State, by officers or individual citizens.

2. Italy

140. The Constitution : The unitary Constitution of Italy resembles that of the United Kingdom in almost all particulars, except in its written character. The *Statuto* which embodies this Constitution was granted by King Charles Albert in March 1848, to his Piedmontese subjects. In later years various other parts of Italy also desired by a popular vote (*plebiscite*) to come under the system of government provided by the said instrument.

141. Amendment : The *Statuto* was originally granted as Royal Charter and in doing so the King relinquished the largest part of his power. He became a King subject to the restrictions of a written constitution, a national Parliament and a Cabinet system. It is a solemn and irrevocable contract between the King and the people and it is beyond the power of the King to alter it although in the form of a Charter. In the *Statuto* itself there is no provision for amendments, but the Italian jurists are agreed that it can be modified by Parliament by ordinary legislation and no constituent assembly is required for the purpose. In fact, the Italian Parliament has enacted from time to time such laws as subtract from or otherwise alter the constitutional system in various particulars. There is no legal obstacle to prevent Parliament from enacting such laws and even from altering the text of the *Statuto* itself. It is thus made clear that a written constitution is not necessarily either rigid or immutable.

142. The Crown : The Italian Monarch enjoys a Civil List of about 15,000,000 lire. His powers are extensive in theory, but strictly limited in practice. The Ministry is the working executive, continually responsible to the Lower House. All acts of the King are done in his name by the Ministry. Even the power of veto is rarely or never used. However, like the English Sovereign, the Italian King also exercises a good deal of influence over administrative affairs. He is perhaps more powerful than the English King. His voice in foreign affairs carries much weight ; he is the Commander-in-Chief of the forces, actually taking the field at the head of the troops ; he appoints the Premier and exercises wide discretion in doing so ; he attends and presides over Cabinet meetings ; he exercises ultimate control over the Ministers and is not bound to act always upon their advice ; and he can even dismiss them irrespective of their relations with Parliament.

143. The Ministry : (1) *Composition :* The Ministry consists of the heads of about fourteen executive departments. The premier is chosen by the King. There being many parties and party-groups, the King exercises a wide discretion in this choice, like the President of France. And every Ministry is

necessarily a coalition. The Premier nominates his colleagues and the King appoints them officially. To be eligible a man must be a member of either House; if he is not, he must seek election on the next seat falling vacant in the Lower House, after his appointment, unless in the meantime he is made a Senator. In fact, all of them, including the Premier are selected from the Lower House, except, Ministers of War and of Marine who are frequently selected from the Senate, because of their technical qualifications. Each Minister is assisted by an Under-Secretary. (2) *Functions and Status* : The business of the Ministers is, individually, to manage the affairs of their several departments, and collectively, to determine policies, initiate legislation and to perform all other functions belonging to the Ministers under a Cabinet system of government. The Premier convokes and generally presides over their meetings. In respect to administrative methods and political policy, ministerial uniformity and solidarity is considered essential. The Ministers and Under-Secretaries are entitled to appear in either House and take part in debate; they can, however, vote only in the House in which they are members. The Chambers can make a formal request for the presence of a particular Minister in their midst, and it will generally be honoured, but they cannot compel them to do so. Like the French Parliament, Italian Parliament keeps a close watch on the Ministers and upsets Government by entering into administrative details. Frequently, Legislative Commissions are set up to investigate an administrative act or policy. (3) *Exercise of Ordinance power*: The administrative system of Italy has been modelled upon that of France. It gives an unusually large place to the promulgation and enforcement of Ordinances by the executive. The constitution empowers the executive to "make decrees and regulations necessary for the execution of the laws without suspending their execution or granting exemptions from them." In practice, the power is stretched sometimes to the creation of temporary law or virtual negation of Parliamentary enactments. Parliament itself is seldom disposed to stand rigidly upon its strict rights in this matter and sometimes expressly delegates to the Ministry the exercise of sweeping legislative authority. This is, in fact, the source of the absolute power wielded by the present executive under Sr. Mussolini, about which we have heard so frequently in recent years.

144. Parliament. The legislative functions are vested by the constitution in the King and Parliament, the latter consisting of two Chambers. (1) *The Senate* is composed of (a) all Princes of the Royal blood, sitting by right at the age of 21 years and voting at the age of 25 and after; and (b) persons appointed for life by the Crown, i. e., by the Ministry. In fact, it is a nominated Upper Chamber. The King's choice is not restricted but he generally selects from twenty-one specified classes of citizens, which include high-officers of Church and State, persons of fame in science and literature, income-tax payers to the amount of 3000 lire and others. The constitution requires that every member of class (b) must be at least 40 years of age,

The number is not fixed and the device of swamping the opposition to meet the political situation of the moment is often used. As a result, its legislative independence is reduced to a nullity. It is useful only as a revising agency and sometimes manages to secure important changes in the details of proposed laws, like the British House of Lords. But it is no longer a checking or an initiating branch, and as a rule, does not oppose the great measures of the Lower House at all. (2) *The chamber of Deputies*: The Lower House consists of 508 members elected simultaneously by direct vote in single-member districts for a term of five years. In theory, the two Houses have concurrent powers of legislation, but in practice, most of the bills are initiated in the Lower House. The bills that have a distinct judicial bearing are introduced first in the Upper House, while all money-bills must be introduced first in the Lower Chamber. As a rule, the members of the Ministry initiate new legislation, but private members also introduce bills freely unlike those in England.

145. The Judiciary : The Kingdom is divided into 1535 *Mandamenti*, 162 tribunal districts and 20 appellate court districts (1) In each *Mandamenti* there is a magistracy trying both civil and minor criminal cases. (2) The district Courts are Courts of First Instance for offences involving a fine of more than 1000 lire and for appeals from lower Courts. There are also Courts of Assize for higher criminal cases. They have also jurisdiction in cases of press offences and those involving attacks upon the security of the State, when the Senate, is not organised as a High Court of Justice. (8) The Appeal Courts hear appeals on the decisions of the penal tribunals, in cases not dealt with by the Assize Courts. (4) The Courts of Cassation have final jurisdiction in all cases involving questions of error in the application of ordinary civil law. They also decide questions of conflict of jurisdiction between different Courts. These Courts are five in number, each assigned to a separate defined territory. There is no appeal from one to another. (5) The Senate may be constituted by the King a High Court of Justice for the trial of cases involving treason or other attempts upon the safety of the State, and for the trial of Ministers, against whom impeachment proceedings are brought by the Lower Chamber.

146. Administrative Courts : Although a sharp distinction is maintained between public and private law, the separation of functions between the ordinary and the administrative Courts is not so clear-cut as in France. (1) A Court with a Prefect and certain assistants is set up in each province with inferior administrative jurisdiction. (2) A section of the Council of State, composed of a president and eight councillors named by the King serves as Higher Administrative Court. In practice, the ordinary Courts exercise jurisdiction in matters where the question is one of private right ; if it is one merely of private interest, it goes to the administrative Courts for decision.

CHAPTER VIII

FEDERAL CONSTITUTIONS

1. GENERAL

147. General Principles : Federalism is opposed to unitarianism. In an unitary state, the strength of the state or the governing power is concentrated in the hands of one visible sovereign body or person. That body or person, in whom the power of the state is located, may either be a popular and representative assembly like parliament or an absolute despot like the Czar. In a federal state, on the other hand, the power of the state is distributed among a number of co-ordinate bodies each originating in and controlled by the constitution.

148. Circumstances favouring federalism : When groups of communities united by common interests but possessing no political unity of a visible kind have grown to a certain size in numbers, wealth and territorial extent, then the problems of nationality, statehood, sovereignty and government arise. It is by the operation of sentiment and economics combined, with the instinct of self-preservation as the final spur, that nations acquire their first sense of nationality and subsequently experience the need of institutions to embody, protect and sustain it.

149. Requisites : (1) So the first requisite of federalism is the *existence of a group of countries or state* that are closely connected together by contiguity, history, race, traditions and the like elements. When such states are threatened by outside attack, they desire union with their neighbours for mutual protection. If we examine the history of various federations of the World, we find that fear of foreign attack was the immediate cause of their union. For instance, the fear of invasion from east and west alike drew the German States together; and likewise the dread of England made the American Colonies come together to form a union. (2) But while these states desire *union* with one another, they do *not* desire unity. Their love for their individual state, their local patriotism is too powerful to allow them to merge into a unitary state and put an end to their separate existence as a state. So they become fused together into a single central state in regard only to matters affecting their common interests, but retain separation and independence as individual states in regard to all other matters. Such fusion is known as *federation*. A single nation is thereby formed in regard to common matters, such as common defence or relations with foreign countries, without sacrificing independence and autonomy of individual states in matters concerning their internal

government. The strongest federal unions are those in which the local patriotism finds a comfortable place within the embrace of larger national patriotism.

150. The language, as some writers unduly emphasize, is not an absolute requisite for the formation of a federal state. No doubt, a common language is a great harmoniser and a powerful agency, but the want of it is not a bar to such union. In the well-known federal states of Switzerland, the United States and the Union of South Africa one political allegiance covers many tongues and the factor is by no means a serious hindrance.

151. Characteristics of Federal Institutions: A constitution to be called truly federal must present prominently certain political features. These characteristic factors are four in number.

(1) **The Supremacy of the Constitution** is the pivot of federalism. A federal state comes into being by means of a constitution, which controls all powers, whether executive, legislative or judicial and whether belonging to the nation or to the individual states. Nobody can exercise a single power which is inconsistent with the articles of the constitution, which constitute the "Supreme Law" of the land. It is supreme over all other laws. There is no such distinction between supreme law and ordinary law in English polity. It is a solemn contract between two parties, not an ordinary Statute. This doctrine is peculiar and essential to federalism. It involves three consequences: (a) It must be a written constitution. A federal state can be formed only by a contract between different states and to avoid future misunderstanding the terms of the treaty must be clearly recorded in writing. (b) It must be a rigid constitution. The law of the constitution must be either unchangeable or changeable only by means of a special machinery. That power cannot be safely vested in any ordinary legislature, acting under the authority of the constitution. Such legal sovereignty in the United States of America is vested in the States' Governments forming an aggregate body, represented by three-fourths of the States forming the Union. Such a sovereign is hard to rouse and hence a federal constitution tends to be immutable. (c) Every legislative assembly existing under such a constitution is a subordinate law-making body whose enactments become invalid or unconstitutional as soon as they over-step the limits of the authority conferred upon them by the constitution. They are not sovereign bodies like the English Parliament.

(2) **The division of Authority:** As has already been stated, the aim of federalism is to reconcile and fuse together the sentiment of national unity with that of independence of individual states. (a) This object involves the division of authority between the component parts of the federation, viz., the national government and the separate states. They are assigned specific functions by the constitution in legislation, in judicial competence and in executive action,

This division of functions and subjects may vary in different federal constitutions, but there is always a certain minimum of power which the central government possesses, leaving the residue in the hands of the states. However, to prevent the central government from encroaching upon the rights retained by the states, their spheres of action must be rigorously defined and the line of demarcation must be definite for the smooth operation of the federal system. Thus the constitution of the United States of America delegates special and closely defined powers to the executive, legislative and judicial bodies of the Union and those powers that are not so delegated or specially prohibited are left to the individual States. The foreign relations, defence, national communications, commerce, coinage, banking, issue of paper money and insurance are generally the subjects assigned to the Central Government, the first two being the most essential. (b) Again, in the Central Government instead of concentrating this authority in any single official or body it is distributed amongst three different authorities, such as the President, the Congress and the Courts. These authorities are at once co-ordinate with and independent of each other. No one of them can encroach upon the powers of another. (c) Besides this division, certain principles of policy or of justice are enforced upon the Central Government and the different States further restricting the powers of both. These maxims have special claim to respect and observation. This tendency of federalism to split up and limit authority on every side distinguishes it from an unitarian system, like that of England. While in the United States of America, the executive, the judiciary and the legislature all stand on a level with one another, in England both the executive and the judiciary are legally subject to the control of Parliament in which body all the power of the realm is concentrated. Under a federal system the powers of the Federal state are distributed amongst several co-ordinate bodies which originate from and are controlled by the constitution; under an unitary system the whole power is concentrated in the sovereign person or body.

(3) **The power of the Judiciary :** The third chief feature of a federal constitution is the power given to the Courts of Law to guard against unconstitutional enactments of the legislature. Under such a system, the legal supremacy of the constitution is essential to the existence of the federal state. This problem has been solved by the founders of the American Constitution by investing the Judges with the power and the duty of deciding whether Acts of the legislature are consistent or otherwise with the Constitution. Judges of individual States as well as of the Supreme Court are bound to treat as void all enactments of either State or Central Legislatures, if they are repugnant to the Constitution. The Courts derive their existence from the Constitution and stand on the same level as the executive and the legislature. The Supreme Court controls all these Courts whether a State Court or a Federal Court, by its appellate jurisdiction and thus becomes the final interpreter of the Constitution,

The Judges of these Courts have their independence secured by the fact that they hold office during good behaviour and their salaries cannot be diminished while they are in office. Besides, the judicial department, at the head of which stands the Supreme Court, has its own officers to execute its judgments. And this power of the Courts is not a dead letter. It is frequently exercised, but only in cases that come before them for decision. They can only perform judicial functions and decide cases before them as the Courts in England decide whether a particular bye-law of a corporation is consistent with the Act of Parliament from which the Corporation derives its existence. In this respect, the American statesmen have only applied to their own case the conceptions of English law which they inherited, and in doing so, they created the most completely developed federalism.

(4) **Direct contact with the people :** The division of functions and subjects are so defined as to permit federal and provincial powers, respectively, the completest possible freedom of action, each in its separate area, including direct contact by the government with the individual citizen in respect of its legitimate functions. The separation of spheres is to be accompanied by the power in each government to make its will effective within its proper sphere.

152. Federal States and Confederacies : A federal state derives its force from the will of the people and not by way of delegation from the constituent states. The latter are juristically supposed to have divested themselves of their individual sovereignties and melted into the general body of the people, who create the federal constitution and re-create the individual states. The independence and autonomy of these states then depend upon the constitution which creates a central state with national citizenship. A confederacy, on the other hand, is a league of several independent states, who without parting with their individual sovereignties enter into a compact for certain common purposes, usually that of defence. In the central government, which is created thereby, there is no fusion, no formation of new political society with sovereignty, and no divesting of old individual sovereignties. While cessation from a federation is illegal, withdrawal from confederacy is not, juristically, illegal. In a confederacy, the central government has no authority directly over the citizens of various states, but only on the states as individual units entering into the compact. In a federal state, there is double government, double citizenship, double allegiance and double patriotism, the central government claiming obedience directly of all citizens of all the component states.

2. The United States of America

153. Distribution of Sovereign Power : The Constitution of the United States of America is the most completely developed type of federalism. When we compare it with that of England, we find that the former is the exact opposite of the latter in the principle of distribution of powers. As seen

already, in the unitary Constitution of England, the sovereign power is concentrated in Parliament. In the American polity the executive, the legislative and the judicial powers are distributed amongst bodies, each of which is co-ordinate with and at the same time independent of the other. This distribution is the essence of the federal form of government.

154. The Constitution of the United States of America was drawn up by a Convention of thirteen States in 1787. It was to come into operation when ratified by nine States and that ratification took place in June 1788. The remaining four states gave their assent before the end of May 1790. Since that date thirty-two other States have been admitted into the Union. Between 1789 and 1934 twenty amendments have been incorporated into the Constitution, the last of them being for the repeal of the ammendment concerning prohibition of drink (1934).

155. The President is the supreme federal executive authority and derives his power direct from the Constitution. Article 2 (sec. 1) of the constitution recites the oath which he takes on assuming office. It is a pledge that he will scrupulously regard the rights of the individual States and acknowledge the sovereignty of the people, as laid down in and manifested by the Constitution. The aim of the framers of that document was to create a National Government strong enough to defend the country from external attack or internal disruption, but the same time they shrank from endowing it with power which might tempt it to usurp the functions of the States or to override the popular will. The oath was purposely prescribed to provide against these contingencies. Article 4 (sec. 4) of the constitution guarantees to every State a republican form of government and enjoins upon the Central Government the duty of protecting them against invasion as well as domestic violence. The Federal Government of which the President is the chief executive officer receives from the constitution only that irreducible minimum of functions absolutely needed for national welfare. It is placed in direct contact with all the citizens in respect of these functions, and the normal course of Federal Administration runs on a different plane from that of the States. When this normal course is disturbed, the Central Government encroaches upon the otherwise protected autonomy of the States. When any State attempts to overthrow the republican form of government or to resist the legitimate action of Federal officers in the course of their duty, the President can interfere, if necessary, by force of arms. He is under constitutional obligation to maintain a Federal army or to require the assistance of the militia of another State, on the request of any State, by the resolution of the State legislature or appeal from the State executive (when the legislature cannot be convened) in suppressing domestic violence.

The President and the Vice-President are *elected* for four years. A number of electors equal to the whole number of Senators and Representatives that each State is entitled to send to the Congress are appointed in each State by

popular ballot. These electors meet in their several States and give their votes separately for a President and a Vice-President. The results are sent to the President of the Senate, who declares the final result according to the majority of votes. In case of equality, the President is chosen by the House of Representatives by ballot, vote being taken by States, each State having one vote. The Vice-President, in a similar contingency, is chosen by the Senate.

The duties and powers of the President are carefully defined. He is the Commander-in-Chief of the naval and military forces, grants reprieves and pardons, except in case of impeachment, makes treaties and appoints judges, naval and military and other public officers, with the advice and consent of the Senate. He is also empowered to convene and in certain cases to adjourn the Congress. Subject to the advice and consent of the Senate, he appoints seven *State Ministers*, who are the heads of the seven state departments created by the Constitution, and form the Cabinet.

156. Cabinet: These Ministers are, however, not responsible to the Congress; they are solely responsible to the President, who has the power of dismissing them. The President alone is responsible to the Congress.

157. Legislatures: The Central legislative power is vested in the President and the Congress which consists of two Houses, the Senate and the House of Representatives. (1) *The Senate* is composed of two representatives from each State, formerly chosen by their respective *State legislatures*, but now by direct election among the people at large, for six years; one-third of the members have to retire every two years. The Vice-President of the United States is the President of the Senate or in his absence a person chosen by the Senate itself presides. The House can initiate all bills except money-bills. Its advice and consent are necessary for the President in the appointment of public officers and in the conduct of foreign affairs. It has the sole power of trying impeachments of all public officers, including the President instituted by the other House. It is thus an executive council, a judicial tribunal and a legislative body. It represents all the States in equal strength and is the true Federal House, wielding greater powers over public affairs than the House of Representatives. (2) *The House of Representatives* is composed of members elected for two years by the various States in proportion to their population, but not exceeding one for every 30,000. It has the power of initiating money-bills as well as other bills and of instituting impeachment before the Senate. The assent of both Houses and the President is necessary for the passing of a measure. If the President declines, the measure is returned to the House which initiated it and if it is again passed by a majority of two thirds in both Houses, it becomes law. (3) *The State legislatures* are constituted for dealing with local affairs. Their powers are defined by Article 10, of the Constitution, which enacts that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States respectively, or to the

people." The scope of Federal legislation is defined by Article 1 (sec. 8) which includes defence, foreign relations, banking, national communications, and others. Sections 9 and 10 of the same Article prohibit certain actions on the part of individual States.

158. This division of functions leaves such vital functions of government as law and order, civil law, criminal law, local government, education, public health, the raising of the militia and the police power in the hands of each individual State. They are original and inherent powers which belonged to the State before they entered the Union. If a question arises as regards any particular power, it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the Constitution. A State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed. The powers granted to the National Government are delegated powers enumerated in and defined by the Constitution. If a power is not distinctly conferred on the Union, it is not possessed by it and it cannot interfere with the action of a State in that respect. The Congress can legislate only in matters in respect to which a positive grant of power in the Constitution can be pointed out. The authority of the National Government is exercised not through the State organizations, but directly treating the citizens of different States as its own citizens. The individual State stands on its own feet and goes on its own way, touching the National Government at but few points. These few points of contact are the subjects on which the Congress and State legislatures have concurrent power of legislation, e. g., bankruptcy, elections, pilotage and ports. If the Congress, acting within its constitutional powers, passes an Act, which conflicts with an existing State statute, the latter gives way and the Federal Act becomes the only law. It, however, merely suspends the State law which becomes valid again and does not require re-enactment, if and when the Federal Act is repealed. In short, a State law on any of these subjects operates only in absence of a Federal law.

159. The qualifications of electors are governed by the State law and not by the Federal law and the latitude left to the States in this matter is wide. There are many remarkable anomalies still in existence in the matter of general franchise and the Congress has not so far interfered with them, although it has power to make one uniform electoral law for the whole country.

160. Amendment of the Constitution: The Constitution cannot be amended by the Congress alone. Such amendments are to be proposed by that body with the approval of two-thirds of both Houses or by a convention summoned on the application of two-thirds of the State legislatures. The amendments so proposed must be subsequently ratified by at least three-fourths of the State legislatures. The ultimate legal sovereignty thus resides in this special machinery and the Congress alone becomes a mere non-sovereign law-making body, unlike the British Parliament. The ultimate political sovereignty,

however, resides in the people as a whole, in both the countries. Tendency to emphasise the popular origin of sovereignty is evidenced in the United States by the recent substitution of popular for an indirect election by the State legislatures in the case of members of the Senate, and also in the practical elimination of the Electoral College in the election of the President. It is asserted by the students of American polity that the Constitution is sustained by the over-whelming force of loyal public opinion. The legal form in which that popular will can manifest itself is through the special machinery for amendment described above. It is purposely devised to protect the interests of the minority. It will be difficult to carry any amendment through if the minority is a little powerful, *i.e.*, sufficiently numerous or if the desire of the majority is not sufficiently vehement. It is evident that such a sovereign cannot be easily roused and hence the Constitution tends to be immutable. It need not, however, be forgotten that the Constitution has been amended twenty times during the course of 145 years.

161. The Judiciary : The judicial power of the Federal Government is vested in the Supreme Court, the judges of which are appointed by the President and hold office during good behaviour. This Court has power to try all cases arising under the Constitution and has original jurisdiction in cases where ambassadors or public officers are concerned or where any State is a party. The Central Judiciary is thus constituted the sole arbiter of the Constitution. Under the Supreme Court there are subordinate Federal Courts established in different States side by side with the State Courts. These Courts of each individual State have exclusive jurisdiction in matters not involving the interpretation of United States Statutes or falling within the jurisdiction of the Federal Supreme Court. The limits of judicial power are more difficult of definition. A citizen can sue or be sued in either Court. The result is that suits are often transferred from State Courts but not *vice versa*. This is done, when a plaintiff who has brought his action in a State Court finds when the case has gone a certain extent that a point of a Federal law is involved. In that case the suit will either be transferred to a Federal Court if the decision of the State Court goes against the applicability of the Federal law. Within its proper sphere of State law there is no appeal from a State Court and though the point of law on which the case turns may be one which has arisen and been decided in the Supreme Federal Court, the State Court is not bound to follow it. Again, where the question is one of State law, in which State Courts have decided one way and a Federal Court the other way, the State Judge ought to follow his own Courts. Even a Federal Court in administering State law will reverse its own previous decision rather than depart from the view which the highest State Court has taken.

3. Switzerland

162. "The Swiss Federal Constitution" says Professor Dicey "may appear to a superficial observer to be a copy in miniature of the constitution of United States". No doubt the former resembles the latter in one or two points and notably in the formation of the Council of States or Senate. But for all this, Swiss Federation is the natural outgrowth of Swiss history, and bears a peculiar character of its own.

163. The Constitution unites the peoples of twenty-two sovereign Cantons of Switzerland into a federation. Article 3 declares that "the Cantons are sovereign in so far as their sovereignty is not limited by the federal constitution, and, as such, they exercise all the rights not explicitly delegated to the Federal Power". Although this article declares the Cantons as sovereign, in effect, fundamentally, the Swiss people is the Swiss Sovereign.

164. The Federal Council: The Federal Executive is composed of seven Ministers elected for three years by both Houses of Federal Legislature sitting together as the Federal Assembly or Congress, but they are not dismissible by that body. They keep their places till the next Assembly meets, when a new election takes place. They need not be, but in fact are, elected from among the members of the Assembly and though they lose their seats on election, for all practical purposes they are considered members of the same. They may speak or introduce measures in either House, but they may not vote. The President and Vice-President of the Council are nominated annually by the Assembly. The President always retains the control of foreign affairs; other executive offices are annually distributed amongst the members of the Council. (a) The *executive functions* confided to the Council are wide. It possesses the authority naturally belonging to the National Government. It is the centre of the whole federal system and as such keeps up good relations between the Cantons and the Federal Government and generally provides for the preservation of order and maintenance of law, throughout the country. All foreign affairs fall within its supervision. Although not dismissible by the Assembly, in fact it has no independence. It is expected to carry out and does carry out the policy of the Assembly and ultimately the policy of the Nation. Politics in Switzerland are a matter of business and the system of its government is entirely businesslike. The Council like a good man of business obeys and carries out the orders of its master, the Assembly. No doubt, constitutionally, many matters are to be decided by the Assembly, which, however, leaves them in the hands of the Council. But the Council reports its actions to the Assembly and if the latter expresses a distinct resolution on any subject, effect would be given to it by the Council. (2) The *Legislative functions* of the Council are performed without any particular responsibility attaching to them. Any proposal or law presented by that body may be rejected by the

Assembly or vetoed by the people; in such a contingency, unlike the British Ministry, the Council is not expected constitutionally to go out of office. In fact, the Council does not represent a majority in the Assembly, as does an English or a French Ministry. The Councilors though elected for three years are re-eligible and in fact are re-elected more than once. There have been cases in which the majority in the Assembly belonged to one party and that in the Council to another and still this want of harmony in political views did not lead to inconvenience. In truth, the Council is not a Cabinet but a Board with the President of the Republic as their Chairman. It resembles a Board of Directors in a joint-stock company. The shareholders can control the action and reverse the policy of these Directors. However, so long as things go well, the shareholders do not interfere. Similarly, the Federal Council carries on the administration like a body of men of business; it is independent and permanent and never thinks of coming into conflict with the Assembly or the nation (3) *The Judicial functions* of the Council pertain to questions of administrative law and also to certain classes of legal questions. The Council gives the required sanction to the constitutions or to alterations in the constitutions of the Cantons and determines whether the same are or are not consistent with the Federal Constitution. It also determines to what extent the Cantonal legislation could go. It thus determined some years back the right as to public meetings of the Salvation Army and the extent to which the Cantonal legislation could regulate or prohibit the same. An appeal on certain questions of administrative law lies from the Council to the Assembly.

165. The Federal Assembly: The Federal Legislature is composed of two branches. It is modelled to a certain extent on the American Congress. When the two Houses sit together, it is known as the Assembly. They meet together for several purposes, the notable among them being the election of the Federal Council. The Assembly also sits as a Court of Appeal on certain administrative matters from the Council. The main function of the Assembly is to receive reports from the Council and to legislate. For the purpose of legislation it sits in two separate chambers. (1) *Council of States* is composed of two representatives from each Canton. In that respect it resembles the American Senate but unlike that body is not so influential and plays only a secondary part. It is less powerful than the Lower House. The members are paid by the Cantons they represent, who also regulate their term of office which is generally very short. Unlike the American Senate, no special functions are entrusted to it under the Constitution, (2) *The National Council* directly represents the citizens. Its number varies with the population, each Canton being represented in proportion to its population. Nominally, both Houses are on an equal footing as to originating legislative measures.

166. The Federal Judiciary: The Federal Tribunal is constituted on the model of the American Supreme Court. It is less powerful, however,

than its American prototype. It is composed of fourteen judges and as many substitutes elected for six years by the Assembly, which also designates the President and Vice-President of the Court for two years at a time. It has criminal jurisdiction in cases of high treason as well as other high crimes and misdemeanours, but its powers as a criminal Court are rarely put into operation. It has also jurisdiction as regards suits between the Federal State and the Cantons and between the Cantons themselves. In fact, it interferes in all suits in which the Federation or a Canton is a party. It also determines all matters relating to public law and acts as a general Court of Appeal from Cantonal Courts in cases arising under Federal laws, where the amount in dispute is more than 3000 francs. Besides, it entertains complaints of the violation of the constitutional rights of citizens, whether the alleged right is guaranteed by the Federal or Cantonal constitution. Though possessed of such wide and somewhat indefinite jurisdiction, it is not so powerful as the American Judiciary, because it has no jurisdiction in controversies with reference to administrative law reserved to the Federal Council and the Assembly. And, the domain of administrative law covers as a law a wide range of subjects from the consideration of which this Court is excluded. The tribunal, moreover, though it can treat Cantonal laws as unconstitutional and therefore invalid, is bound by the Constitution to treat all Federal laws as valid. Unlike the American Supreme Court, it stands alone, instead of being at the head of a national judicial system, and has no officials of its own to enforce its judgments. These judgments are executed primarily by Cantonal authorities and if they fail in their duty, by the Federal Council. In case of conflict of jurisdiction between the Council and the Tribunal, the decision rests with the Assembly, and hence, the Court is able to exercise very incomplete control over the acts of Federal officers. This conflict of jurisdiction between the Tribunal, the Council and the Assembly with regard to questions, which will generally be decided in England or in America by a law Court, serves to make clear to us, that in Switzerland there is imperfect recognition of the 'rule of law', as it is understood in England, or of the 'separation of powers', as the doctrine is understood in Continental countries.

167. The Referendum: The most peculiar characteristic of the Swiss Constitution is the institution of Referendum, which is entirely of native growth. It is an arrangement by which no alteration or amendment of the Constitution, and no Federal law which any large number of Swiss citizens think of importance comes finally into force until it has been submitted to the vote of the citizens and has been sanctioned by a majority of the citizens who actually vote. It must be added here that the change in the constitution thus referred to the people comes into force only if it is approved not only by a majority of the citizens who vote, but also by a majority of the Cantons. This arrangement of referendum exists in one form or another in all the Cantons except one and hence it is an

essential feature of Swiss constitutionalism. It is in effect a nation's veto. It gives to the citizens the power of arresting legislation, the power of which was once possessed in fact, and is now possessed in theory, by the English Monarch. As some writers, therefore, put it: the nation in Switzerland is the Monarchy, the Executive and the members of the Assembly are the people's Agents or Ministers. The citizens occupy the position of an absolute monarch, who can veto the measures of his councillors. When a law passed by the Assembly is submitted to them and they refuse their assent, it does not become in reality a law. Besides this negative power, there is also a positive power in the hands of the Cantonal Constitutions. This power is known as the "*initiative*". It is a device by which a number of citizens can propose a law and require a popular vote upon it despite the refusal of the Assembly to adopt their views. Both these institutions, *viz.*, the Referendum and the Initiative show how the citizens take direct part in legislation.

168. Effect of Referendum : The Referendum taken with other provisions of the constitution produces two effects in particular. (1) The first effect is to alter the position of the executive and the legislature. It decreases their powers and they bow to the popular will without any discredit to themselves. They are not therefore obliged to resign and in fact the electors re elect the members whose legislation they refuse to accept. (2) In the second place, it discourages the growth of party government. When the citizens themselves can veto undesirable legislation, it matters very little to them that some of their representatives should entertain political opinions which do not at the moment commend themselves to the majority of the electors. The habit acquired by direct participation in legislation accustoms Swiss citizens to consider any proposed law on its own merits, unlike the voters in other countries, who are prone to support only a party programme as a whole, whether they like all its provisions or not.

169. American and Swiss systems : (i) As contrasted with the American system, we find the Senate in America more influential and powerful than its prototype, the Council of State in Switzerland. (ii) The Federal Judiciary also cannot stand in comparison with the supreme Court. (iii) The exercise of judicial functions by the Council and the Assembly are not in unison with the modern ideas as to due administration of justice.

4. The Commonwealth of Australia

170. The Constitution : The Commonwealth of Australia Act, enacted by the British Parliament in 1900, created a federation of six States, *viz.*, (1) New South Wales, (2) Queensland, (3) Victoria, (4) South Australia, (5) Tasmania and (6) Western Australia. As the preamble of the Act describes, it is not the individual States but the people of these six States, who are united together in one indissoluble Federal State under the Crown of the United Kingdom,

171. Amendment: The Constitution can be altered by an Act passed by an absolute majority in both Houses. If one House refuses to pass such an Act, another Act can be passed only after an interval of three months and that also must have an absolute majority in either House to be effective. The Act so passed must then be referred to the electorate and must be passed both by a majority of all the electors and by a majority of the electors in a majority of the States. The last stage is to present it for the Crown's assent. There is one restriction well-worth noting. No alteration diminishing the proportionate or minimum representation of, or effecting the provisions of the Constitution with regard to any State can become law unless approved by a majority of electors in that State. It is evident from this that though legal sovereignty still vests in the Crown and the British Parliament, the political sovereignty resides in the people of the Commonwealth. The British Parliament, in passing this Act, assigned to the people of Australia some of the highest attributes of sovereignty and from that moment, its own power to restrain Australia from doing what she wishes to do, has ceased to exist, in practice, though not in theory. In theory, the British Parliament still possesses the sovereign power and can repeal the Act and dissolve the Federal State.

172. The Executive: The executive power of the Commonwealth approximates to the British model in its close relation to the legislature. It is vested in a Governor-General appointed by and representing the Crown and a Federal Executive Council of members chosen by the Governor-General. (1) The *Governor-General* is given various statutory powers, by which he is empowered to do many things in theory, but, in practice, these powers are exercised according to the will of the people. Though he is not reduced to a cipher and can get many opportunities to exercise his discretion, the Federal legislature, in virtue of its control of the Ministry, is a factor more important than the executive, in the working of the Constitution. (2) The *Executive Council* is composed of the Ministers of State chosen by the Governor-General, from amongst the members of the legislature. They act as the heads of various government departments. In theory, they form the advisory council of the Governor-General, but in reality they are responsible to the Federal Parliament.

173. The Legislature: The Federal Parliament is composed of the King, represented by the Governor-General, the Senate and the House of Representatives. (1) The *Senate* is composed of members elected by the various States in proportion to their population for six years, half their number retiring in rotation at the end of three years. (2) The *House of Representatives* consists of members elected for three years, similarly, by the States in proportion to their population. The number of members is double those of the Senate.

174. ' Powers of Federal Parliament: The grant of powers to Parliament is designed on the American plan. It is given certain exclusive powers of

legislation and it may also legislate on a certain number of matters expressly specified by the Act. It is empowered to legislate for the peace, order and good government of the Commonwealth with respect to thirty-nine expressly specified subjects. Thirteen of these subjects are only applicable to the Commonwealth as a whole and were created by the Act to vest in the Federal Parliament, being essential for the performance of duties naturally belonging to a sovereign government. Three more, formerly vested in the States are now exclusively assigned to Federal Parliament, namely, bounties on mines, naval and military defence and coinage. Twenty-three remaining subjects formerly belonged to the States exclusively, but are now within the concurrent legislative powers of both Federal and State Parliaments. In these cases, if any inconsistency arises the law of the Federal Parliament prevails.

175. The Power of the States : The position of the States in Australia, like those in America, is that of the holders of the residue of sovereignty, or at least the sharers of it with the people. Their Constitutions are guaranteed by the Act. The Governors are appointed directly by the Crown and not by the Governor-General. The Parliament of a State is entitled not only to maintain and execute the Constitution but also to amend it. It is also empowered to legislate on various matters affecting the State, within the limits and in the manner prescribed by the Constitution. Under the Australian Constitution Act, 1907, bills passed by the State Legislatures must be reserved for His Majesty's pleasure, which (a) alter the Constitution of the State Legislature or its either House, (b) affect the salary of the Governor, or (c) are required to be so reserved by an Act of the State Legislature or by the bill itself.

176. The Judiciary : The judicial power of the Central State is vested in a High Court, which has jurisdiction to hear appeals from its original side, from the Supreme Court of any State and from the *Inter State Commission*. This Commission is constituted by the Act to execute and maintain the provisions of the Constitution relating to trade and commerce. The decisions of the High Court are final as a rule, but His Majesty can grant special leave to appeal to the Privy Council in England. But in some cases even for such special leave, a certificate from the High Court, to the effect that the question is a proper one for appeal, is required. The right, however, of appeal from the State Courts, direct to the Privy Council, has not been taken away by the Act. The High Court also decides questions of the constitutional status of the Commonwealth and of the individual States.

5. Dominion of Canada

177. The Constitution. The Dominion of Canada was created by the British North America Act, 1867. It was composed originally of four States, viz., the Provinces of (a) Ontario, (b) Quebec, (c) Nova Scotia and (d) New Brunswick. Subsequently, by the British North America Acts of 1871 and 1886 six more Provinces were admitted into the union, viz., (1) the Pro-

vince of Manitoba, (2) British Columbia, (3) Prince Edward Island, (4) The North-West Territories, (5) Alberta and (6) Saskatchewan. The original Act described the Constitution as "similar in principle to that of the United Kingdom". However, it is not similar in principle except in one grand essential. The practice of responsible government, with a Cabinet sitting in Parliament, is almost an exact copy of British practice.

178. Amendment: Unlike Australia, there is no power in Canada to amend the Constitution. Every proposal for amendment must be made in the British Parliament. The latter, on the other hand, could enact nothing in the way of Canadian constitutional amendment except on the invitation, and with the consent of the Canadian people and Parliament. This special arrangement is largely due to the existence of communal and religious apprehensions prevailing in the country at the time the Act of 1867 was passed.

179. The Executive: The Executive power of the Central Government is vested in the Crown and is exercised by a *Governor-General* appointed by the Crown, and a *Privy Council* composed of members nominated by the Governor General. The members of the Council, who act as the heads of various government departments, form the Cabinet, which is responsible to the Canadian House of Commons. The Governor-General acts on the advice of the Cabinet in all matters relating to administration.

180. The Legislature: The legislative power of the Dominion is vested in the Crown and a Parliament of two Houses. (1) The *Senate* or the Upper House is composed of members nominated for life by the Governor-General and not elected by the various Provinces. (2) The *House of Commons* is composed of members elected for five years by each Province in proportion to its population. The number may increase or decrease with the growth or decline in population every ten years when the census is taken. There is one exception to this rule in the case of Quebec. That Province is always to be represented by sixty-five members.

181. The power of Parliament: The Canadian Parliament is empowered by the Act of 1867 to legislate on all matters not coming within the classes of subjects exclusively assigned to Provincial Legislatures. Thus the residue of power is vested in the Federal Government. The converse is the case in the United States of America and the Commonwealth of Australia. At the same time, the Dominion Parliament is empowered exclusively to make laws on certain classes of subjects. With regard to such matters as are not assigned exclusively to either, both the Dominion and Provincial Legislatures have a concurrent power of legislation, subject to this condition, that Provincial Acts are void so far as they are repugnant to Dominion Acts.

182. The powers of the Provinces: Each province enjoys a responsible government, the executive power being vested in a Lieutenant-Governor ap-

pointed by the Governor-General and an Executive Council appointed by the Lieutenant-Governor. The Legislature of each Province is composed of the Lieutenant-Governor and an elected Legislative Assembly, except in the case of Quebec and Nova Scotia, which have in addition an Upper Chamber, composed of members elected for life by the Lieutenant-Governor-in-Council. These Provincial legislatures have the power of altering their own Constitutions except with regard to Lieutenant-Governors. As already stated they are given power of exclusive legislation in certain matters.

183. The Judiciary : The Supreme Court of Canada is made the interpreter of the constitution by the Act. In the matter of concurrent legislation, cases of conflict often arise between the Dominion and Provincial legislatures, which are settled by this Court, and in doing so, it interprets the Constitution according to the terms of the Act. In the Provinces there are district and county Courts, and appeals, in civil and criminal cases, from the Court of final resort of each Province, lie to the Supreme Court as well as to the Privy Council in England, concurrently. If, however, appeal is taken to the Supreme Court, the decision is final, except in the case where the Crown grants special leave to appeal to the Privy Council.

6. Proposed Imperial Federation

184. Proposal : The topic of Imperial Federation of the United Kingdom has found a prominent place in British Imperial politics during recent years; and various schemes have been proposed with a view to closely unite in a federal state, the several parts of the Empire.

185. Requirements : As has already been stated, various requirements must be fulfilled before a successful federation can be formed (1) The most essential requisite is a group of contiguous states ready and desirous of forming an union. The Empire, in fact, consists of countries which are in no way contiguous; they are separated from the United Kingdom by thousands of miles. No doubt, the distance is extremely minimised in these days of scientific inventions and developments. (2) Another difficulty is that these various states are inhabited by races and tribes widely differing from one another in customs and manners that are the product of absolutely different histories. (3) Again these states must all stand on a footing of equality and must be equal partners in the federal union. The position of British India and the Crown Colonies is not on the same level as that of the self-governing Dominions. The Union, therefore, of the united Kingdom and the self-governing Dominions is likely to be prejudicial to the best interests of British India and the Crown Colonies until self-government is granted to them and they become equal partners. (4) If the proposal is to be considered only from the view-point of the United Kingdom and the self-governing Dominions, there must exist a real desire and readiness on their part to form a union. This desire

and readiness can only be based upon the recognition of mutual advantage. The union, if formed, must prove advantageous for all parties concerned, at least for a certain class of purposes.

186. Advantages and disadvantages: (1) **United Kingdom:** From the viewpoint of the United Kingdom such a union is desirable for three reasons (a) The country is limited in area and its natural resources are not very extensive. The limit of expansion and progress appear to be within a measurable distance of being reached. Such a country naturally feels the strain of holding her relative position with other countries, whose natural resources are greater in extent than her own. The United Kingdom once surpassed them in power and wealth but they are now drawing level with her and may eventually surpass her (b) The population of the United Kingdom is far in excess of that which can be supported by her native natural resources. She has, therefore, to depend upon other countries for her food materials and for the raw products for her industries. Both in the purchase of raw products and in the sale of manufactured commodities she has been hedged round with hostile tariffs and is steadily losing ground in the great markets of the world. The other rival countries, with their growing power and wealth, threaten to overshadow her position. It is, therefore, considered necessary that mutual commerce with other parts of the Empire be encouraged and that they should combine together in fighting the hostile tariffs of other countries. This is one of the most important objects which draws the United Kingdom towards federation. With this object in view, a Conference of the representatives of the various countries of the British Empire was held in 1933 at Ottawa (Canada) and an agreement was arrived at giving preference to one another within the Empire in the matter of tariffs. The said agreement is known as the Ottawa Pact for Imperial Preference. (c) The third and equally important object is the need for combination for purposes of mutual defence and protection to enable the Empire to maintain its position in foreign politics. Side by side with these advantages to be gained from a closer union, there are also disadvantages which cannot be overlooked. (a) A federation will necessitate the creation of an Imperial Parliament composed of the representatives of the United Kingdom and of other parts of the Empire. So far as the self-governing Dominions are concerned, the people of these countries will be no doubt properly represented. But in the case of British India and the Crown Colonies so far, there is no provision to represent the people; only their Governments, who are not responsible to the people and do not in reality represent the views and sentiments of the people, may be represented. Various Imperial Conferences have been so far held to consult and discuss on all matters concerning the interests and policy of the Empire. The constitution and working of these Conferences have aroused much suspicion and opposition in British India and the Crown Colonies. (b) Again, the Federal Parliament, if formed will be superior to the

present British Parliament, which will take place of a State legislature. In the first place, Parliament itself will not agree to such a sweeping change in its position : British India and the Crown Colonies will also object. The British Parliament has hitherto acted as the common trustee of the peoples in these countries. The creation of a Federal Parliament will mean the transfer of trusteeship to the peoples of six countries, instead of those of one, *viz.*, the United Kingdom, as at present. It is feared that these new trustees might exploit the resources of these dependent countries to their own advantage. (c) It must also be taken into account that the federal spirit has no existence whatever throughout the United Kingdom. The idea of federalism is incomprehensible to the mind of an ordinary Britisher ; and local patriotism reigns supreme. Some of the self governing Dominions are already contemplating secession from the British Empire.

187. (2) The Colonies : The viewpoint of the Colonies is also not yet very encouraging. The need for closer union has not yet presented itself in any very forcible form. (a) Their natural resources are not yet fully exploited and they do not feel any need for seeking fresh fields of expansion and the consequent necessity of taking a part in foreign politics. (b) On the other hand, the tendency in each of the self-governing Dominions is to increase rather than lessen their own independence. And, the essence of federalism is to limit the independence of its component parts to make the central government really effective for the attainment of common objects. (c) The Dominions, like the United Kingdom, at the same time, feel increasingly the harmful effects of hostile tariffs. At present, the main bulk of their export trade consists of their raw produce and the prices realised for the same are considerably affected by hostile tariffs. (d) They also feel that with their increasing prosperity and progress, they will have to take their place in foreign politics in near future. In this connection, they have realised the importance of combining for the purpose of mutual defence and protection and contributing their share in maintaining adequate naval and military forces for the same. These two factors, *viz.*, hostile tariffs and common defence are the only impelling forces in favour of federalism. No doubt, the United Kingdom and the Dominions working together in union for these two purposes will be mutually benefitted thereby. Much saving and economy will result from the joint maintenance and control of one Imperial naval, military and air force of the whole Empire. The actual and moral weight of the Empire as a whole will exceed that of any individual State in the field of foreign politics and incidentally in combating the hostile tariffs of foreign nations.

188. The Constitution Proposed : It will not be difficult to find subjects which can properly be entrusted to the control of the federal government. Foreign affairs, defence, trade and commerce, Imperial finance, currency and coinage and such other subjects can with advantage be transferred. The important question, however, is as to what form the federal constitution

should take Various suggestions have been made in this connection from time to time. (1) The *first* method that readily suggests itself to mind is the creation of an Imperial Parliament and an Imperial Executive composed of representatives of all the component parts in proportion to their population. As already stated, such a Parliament would be superior to that at Westminster, the latter taking the position of a state legislature. Some of the administrative and legislative powers now enjoyed by the British Parliament and by the Dominion Legislatures shall have to be assigned exclusively to the new Imperial Parliament, and in some matters, all the three will have concurrent right of legislation and administration. In any case, the laws made by the Federal Parliament will be superior to those of any of the existing legislatures. The British Parliament is not in favour of such a drastic change in its constitution. The constitutional and political sovereignty possessed by it is too dear to be cast away so easily. A federation must, therefore, proceed by gradual stages of development. (2) The *second* scheme is the conversion of the present British Parliament by inclusion of Dominion representatives in both Houses. If this is put in practice, Parliament shall have to be relieved of its duties with regard to matters purely of local interest, which may be handed over to local bodies or to a new Home Government. This scheme is less feasible than the former. It will merely be of a patch-work nature and will result in a medley of conflicting powers, interests and duties. (3) The *third* scheme is to create a Colonial Council of Advice to assist the British Cabinet with regard to matters in which the Dominions are interested. Such a Council, having no legislative or executive functions, will possess no weight or authority. It will be very difficult for the Councillors, also, sitting in England, to gauge the precise shade of public opinion in their own Colonies at any particular moment. Besides, the purpose of such a Council will be more effectively fulfilled by holding Imperial Conferences consisting of the British and Dominion Premiers, at regular intervals.

It is evident from this review that the formation of a federation of the British Empire, is not likely to be achieved in near future. The consensus of opinion at present is against such a drastic change. No doubt, there are certain advantages to be gained by such a combination, but the major part of the Empire, *viz.*, British India, the Crown Colonies and the Protectorates cannot join the union as equal partners unless and until they are granted Dominion Status. Any attempt at federation, therefore, at this moment will be full of peril to all the parties concerned and also to the maintenance of the British Empire.

CHAPTER IX

SUPREMACY OR RULE OF LAW

189. The second distinguishing feature: As we have already seen, the first distinguishing feature of the English Constitution is the omnipotence of the Central Government. This authority was at first in the hands of the Crown; it has now passed into the hands of Parliament. The second distinguishing feature of the Constitution is the *Supremacy of Law, i. e.,* the security given under the Constitution to the rights of individuals. The legality of English habits and the rule of Law under which the country is governed is peculiar to England on the Continent. The love of and respect for justice and the introduction of the Judge into the domain of politics are the most marked characteristics of the English people.

190. Absolute Supremacy of Ordinary Law: Three distinct though kindred conceptions are included under the expression "Supremacy or Rule of Law". (1) The first meaning is *absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power*. It excludes the existence and exercise of arbitrary powers of prerogative and also of wide discretionary authority on the part of the executive. This means that no person can be made to suffer except for a distinct breach of law, proved in a Court of law, in the ordinary legal manner, laid down for the purpose. In this sense, the rule of law is peculiar only to countries which have inherited English traditions. In this category may be included not only the various parts of the British Empire, but also the United States of America. This system may be contrasted with that prevalent in many foreign countries, especially Continental countries, whereby the executive exercises wide, arbitrary and discretionary powers in matters of arrest, imprisonment, expulsion and the like. This arbitrariness or discretion tends to make legal freedom of the subjects insecure. Although at present the rule of law is well established in almost every country in Europe, the things were different in the eighteenth century. Persons in authority or people with influence may ill-treat any body, and the injured person, if he dared to protest, will not only get no redress, but will be further ill-treated. And even now, the arbitrary power claimed by the executive in these countries is much wider than that either legally claimed, or in fact, exercised by the executive in England. The countries which claim to be thoroughly republican and guarantee the rights of their citizens, especially individual liberty, by their Constitutions are still far behind the United Kingdom in this respect. A man may be arrested in these countries by the executive and detained in prison without going through any legal formality. Trial by jury is still unknown to some of

them. Even in customs and habits the people of these countries differ widely from those of the United Kingdom. An average Englishman shows strong love of and respect for justice and dislike for the use of force. An average French or Swiss citizen is lacking in these qualities. From this view-point England is much more republican than France or Switzerland.

191. (2) *Equality of all Classes*: *Secondly*, it means *equality of all classes before the law*. The phrase means that every man, whatever his rank and position, is subject to the ordinary law of the land as administered by the ordinary Courts. There is no distinction between an official and an ordinary person in this respect. An official is as much liable as any ordinary person, not only for wrongs committed in his personal capacity, but also for acts done in excess of his lawful authority. Although, to a certain extent he is governed by what may be called law, he thereby is not exempt from his duties, as an ordinary citizen. A Minister of the Crown cannot plead the orders of the Crown as an exemption from liability for an illegal act. Since the Bill of Rights (1688), the Crown can no longer dispense with the provisions of Acts of Parliament in favour of individuals. Again, since the Act of Settlement (1700), a pardon by the Crown is no longer a bar to an impeachment by the Commons. This is not so in some of the Continental countries and notably so in France. The officials there are to a certain extent exempt from the ordinary law and are governed instead by official law administered by official bodies. The idea underlying the system of administrative law in France is that the government and its agents have rights, privileges and prerogatives differing from those of the private citizens and that the nature and extent of the same are to be determined on principles essentially distinct from those that govern the relations of citizens *inter se*.¹ In English speaking countries, this function devolves upon the ordinary Court of Justice. The case of *Entick v. Carrington*² illustrates the English viewpoint in this matter. Plaintiff Entick, in this case, was suspected of a seditious libel. The defendant Carrington seized his papers under the warrant of a Secretary of State. It was held that the warrant was illegal. Lord Camden C. J. observed in the course of his judgment: "With respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning nor do our books take any notice of such distinction". Like the Ministers, a soldier or a policeman is also liable equally with ordinary citizens to be sued for illegal acts and triable by the same tribunals. He cannot plead the orders of his superior officer as a valid defence. As will be shown in a subsequent chapter, a soldier is in a less favourable position than the ordinary citizen. He remains subject civilly to all the liabilities of the ordinary subject

1 See Chapter VII.

2. (1765) 19 St. Tr. 1067.

and at the same time he is further subject to liabilities under the military law. He runs the risk either of rendering himself civilly liable by obeying the orders of his superior officer, which are clearly and manifestly illegal, or, on the other hand, of committing an offence under military law and rendering himself liable to be punished by Court Martial, if he disobeys the commands of his superior.

192 Exceptions: To this conception of the rule of law, there are certain well recognised exceptions which must be noted here (i) The *Crown* is a partial exception to the rule. Under the maxim "the King can do no wrong," the Crown is exempt from criminal prosecutions and even from civil actions arising out of torts. In other civil actions, a special procedure has to be followed. In actions, such as, for the recovery of real or personal property against the Crown or his servants, the remedy is by a particular process of Petition of Right.¹ The remedy is available to the subject in cases of debt or for damages for breach of contract,² only as a matter of grace and not as of right, and it is not available in actions arising out of tort.³ The prerogative of the Crown, however, forms part of the ordinary common law of the land, and as such, the extent of the prerogative itself is cognizable by ordinary Courts. It will, therefore, be erroneous to suppose that anything like administrative law exists in the United Kingdom. The procedure by Petition of Right is in practice and in really an action at law. A formal sanction of the Attorney-General is necessary and the same is never refused. The contracts with government departments can thus be enforced and damages obtained for their breach. In the matter of torts, the person, who actually does the wrongful act, is liable at law, whether he be a servant of the Crown or an ordinary citizen. The person injured thereby suffers no injustice because of the technical immunity of the crown. Of course, the Government generally pay the damages awarded for the wrongful acts of its officers, done in the course of their official duties. (ii) The *public officers* are also immune, being the servants of the crown from being sued personally or in their official capacity upon contracts made by them in their official capacity. This was decided in the case of *Macbeth vs. Haldimand*.⁴ The remedy in such cases would apparently be by a Petition of Right. The principle is applicable equally to all high and low public officers. However express statutory provision may be made empowering the government departments or public officers to sue and be sued in their corporate or official capacity. Thus the Lord Commissioners of the admiralty are empowered by statute to sue and be sued. Public officers are generally liable in actions of tort to be sued in their individual capacity. It is not necessary to show malice or want of probable

1. Petition of Right Act 1860 (23 & 24 Vict., C. 34). 2. *Att. Gen. v. De Keyser's Hotel* (1920) A. C. 508. 3. *Tobin v. Reg.* (1864) 16 C. B. (N. S.) 810. 4. (1786) 1 Term, Rep. 179. See also *O'Grady v. Cardwell* (1872) 20 W. R. 342 and *Dunn v. Macdonald* (1897) 1 Q. B. 555.

cause on their part. In their official capacity they are not liable and especially so in cases of trespass.¹ (iii) The *Judges* are not liable to be sued for any acts done in their official capacity, whether maliciously or otherwise. The exemption extends to acts done even outside their jurisdiction. They will not be so exempted, however, if they knew and had means to know that the act complained of was outside their jurisdiction.² (iv) Similarly, *Justices of the Peace* are also protected but not to same extent as the judges. While keeping within their jurisdiction if they act maliciously or without any reasonable and probable cause an action will lie against them.³ For acts done outside their jurisdiction they are always liable and the plaintiff need not prove malice or want of reasonable and probable cause to obtain damages. They are, however, subject to special procedure for acts done in their official capacity, and so are mayors, constables and certain other officials, in certain cases.⁴ The period of limitation for such actions is six months, from the date of act complained of.⁵ The public Authorities Protection Act, 1893⁶, generally provides that actions against public officers in respect of acts or neglects or defaults, in the execution of Acts of Parliament, or of any public duty or authority, must be commenced within six months of the act or default, or in the case of continuing injury or damage, within six months after the ceasing thereof.

193. (3) Constitution, the result of Ordinary Law : The *third* sense is that the *constitution is the result of the ordinary law of the land*, meaning thereby that the rules of the constitution are deduced from decisions of the Courts of Law determining the rights of individual citizens in particular cases brought before them. (i) While in other countries the rights of individuals are secured by the constitution, they are, in England, the result of judicial decisions and form a part of the constitution. In countries like France the rights of individuals are enunciated and guaranteed by the constitution. On the other hand, the English constitution does not declare or define these rights. They are not deduced from the principles of the constitution, but are generalisations based upon particular decisions of the Courts. These rights are secured, in England not by the constitution, but by the ordinary law of the land. No doubt, the chief landmarks of the British constitution, such as Magna Carta, the petition of Right and the Bill of Rights, contain enunciation of such principles. These principles are not, however, in the nature of declaration of right, as understood in France and other countries. Even before the said documents came into being the rights were in existence and the only object of reiterating them in these documents was to condemn the claims or practices on the part of the Crown and to pronounce the same as illegal. In fact, every right enumerated in these documents refers to some distinct excess of authority indulged in

1. *Kaleigh v. Goschen* (1878) 1 Oh. 73. 2. *Anderson v. Gorrie* (1835) 1 Q. B. 670. *Calder v. Halket* (1839), 3 Moo. P. C. 38. 3. *Jervis' Act*, Sec (11 & 12 Vic., c. 44), 4. Sec. 2, *Ibid.* 5. Sec. 18, *Ibid.* (6) Sec. 8, *Ibid.* 6. 56 & 57 Vict. c. 61, Sec 1.

by the Crown, in the name of his prerogative. If we examine the establishment of such vastly important principles as the independence of juries and the immunity of judges for acts done in their official capacity, we will be able to see distinctly the importance of judge made law to the constitution. These principles were only established by judicial decisions in particular instances. (a) Until 1670, juries might be, and in fact, frequently were, severely punished for verdicts proved wrong on appeal, or even for a verdict contrary to the direction of the Court. *The Bushell's case*¹, settled this principle once for all. A jury was fined and committed in default by the Recorder of London, for acquitting two accused. A writ of *habeas corpus* was applied for. It was pleaded that they were committed for having returned a verdict 'against the plain and manifest weight of evidence and against the direction of the Court on a point of law'. Vaughan C. J. held that a jury could not be punished in a criminal case for not finding in accordance with the weight of evidence and the judge's direction. (b) The immunity of Judges was established by *Howell's case*² which was a suit arising out of *Bushell's Case*. One of the jurors imprisoned brought an action against the Recorder for false imprisonment. The Court of Common Pleas unanimously held that no action would lie against a judge for wrongful acts done in his judicial capacity. (ii) It is also to be noted, that while foreign constitutionalists have devoted so much attention and shown so much anxiety in defining these rights, they have almost often failed to make adequate provision for the enforcement and protection of the rights they so loudly proclaim. The Englishmen, on the other hand, have fixed their minds more intently on providing remedies for the enforcement of particular rights or for averting definite wrongs, than upon any declaration of these rights. The maxim "for every wrong there is a remedy" is quite well known. Of course, this difference has nothing to do with the existence of a "written" constitution, or the declaration of rights contained therein. The same condition of things prevails in the United States of America, as in England, despite a written constitution. Besides, declaring these rights in the constitution the American statesmen have shown unrivalled skill in providing means for the enforcement and protection of these rights. (iii) Another thing to be noted here is that where rights of individuals are deduced from the constitution, the idea readily occurs that they can be suspended or taken away. On the other hand, where they form a part of the constitution because they are inherent in the ordinary law of the land, they can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.

194. Recent decline: This reverence for the rule of law has suffered a marked decline during the last few years. This decline makes itself in three ways: (1) First, by actual legislation. Acts have been passed

1. (1670) St. Tr. 999; Vaugh. 185. 2. *Hammond v. Howell*, (1678) 2 Mod. 219.

recently, e. g., the Factory Acts, the Education Acts, giving judicial or quasi-judicial powers to officials and diminishing thereby the authority of the Law Courts. The cases arising under these acts are taken out of the jurisdiction of the ordinary Courts and the sphere of the rule of law is thereby curtailed. (2) *Secondly, by distrust of judges and of Courts.* This is specially noticeable in the working of the trade unions. They try to enforce their rules upon their members. In doing so they often come in conflict with the ordinary law of the land, because, although these rules may be beneficial to the trade generally, their exercise often interferes with the right of individual liberty. And, it is claimed by the upholder of trade unions, that to be really effective and beneficial these institutions must be protected from the intervention of judges. (3) *Thirdly, by the tendency to use lawless methods* for the attainment of social or political ends. This tendency has grown in importance in recent years. Such law breakers who are properly known as passive resisters or conscientious objectors, justify their lawless actions by the nobleness of the aims they strive to achieve. A popular belief has grown up in England during the last forty years that the attempts of passive resisters or conscientious objectors are not only allowable, but they are praiseworthy also, if the person doing so is moved by higher ideals. The idea that a breach of law is *per se* an act of immorality and worthy to be condemned by all good and law abiding citizens, has long since been exploded. This state of affairs is due to various reasons. (i) With the spread of democratic sentiment amongst the masses, people have begun to demand that every law should be in accordance with public opinion and if it is not so, every person in the land has a right to break the same and show his resentment for not being consulted. When the sentiment takes the form of mass civil disobedience it becomes a very effective weapon in the hands of the people against the arbitrary powers of the executive. (ii) Side by side there is also a belief that even the use of brute force will be morally justifiable against unjust and oppressive law. This, however, is likely to be misconstrued. Open rebellion and use of armed force against the executive leads bloodshed and does more harm than good to the community in general. However, if such attempts are successful they benefit the people as a whole in the long run. For this reason if people make such attempts with honest conviction and for no personal gain, they must not be blamed or punished for rebellion. (iii) The mismanagement of party government also engenders certain amount of lawless spirit. Strict adherence to party rules and programme may sometimes go against the best interests of the nation and the dictates of true patriotism.

2. Droit Administratif or Administrative Law

195. Notable Difference: When we compare the constitution of England with that of France, we find a notable difference. While absolute supremacy of ordinary law prevails in England and is a notable feature of its constitution,

a scheme of administrative law prevails in France giving protection to servants of the State against the ordinary law of the land.

196. What is Administrative law? It is made up of a body of rules devised to regulate the relations of the State towards ordinary citizens. It forms a part of the French law which deals with (a) the position and liability of State officers; (b) the rights and liabilities of ordinary citizens in their dealings with officials as representatives of the State, and lays down (c) procedure to enforce their rights and liabilities. The case of *Entick vs. Carrington* discussed here this affords a good illustration in this respect. If that case had happened in France the Ministers of the Interior need not have stopped at issuing a warrant merely for seizing his papers, alleged to contain a seditious libel, as did the Secretary of State in England. The former could have even imprisoned him and his case could only have been enquired into by an administrative Court and not an ordinary Court as in England. This law has grown up during the 19th century. Its development may be divided into three periods.

197. First Period, 1800-1830: Napoleon and the Restoration : In fact the administrative law of France (*Droit Administratif*) can be traced back to the ancient regime, but Napoleon adapted it to the changed conditions of his time. It received a new character and a new life, at his hands. Two chief principles on which this system of law is founded are : (i) The servants of the State, as representatives of the nation, possess special privileges, rights and prerogatives as against private citizens. A private citizen does not stand in his relation with the State on the same footing as that on which he stands in his dealing with another private citizen. The extent of the privileges, rights and prerogatives of the administrative officials are, therefore, to be determined on principles different from those which determine the legal rights and liabilities of the citizens in their relations towards one another. (ii) The second principle is about the separation of powers of the executive, the judiciary and the legislature so as to prevent them from encroaching upon one another's domain. This leads to the result of keeping the State officers immune from the jurisdiction of the ordinary Court. The doctrine of separation of powers is understood in a different sense in England. The executive, the legislature and the judiciary are each to be independent of one another in their own particular domain, and must exercise their authority without being in any way hampered or influenced by the one or the other of the remaining two powers. In France, while the principle that the judges ought to be irremovable and thus be independent of the executive, is accepted, they maintain, at the same time, that the officers of the executive, while acting officially ought to be independent also and exempt from the jurisdiction of the ordinary Courts. Under that system, the officials are not liable to be tried by the ordinary civil Courts for acts done in their official capacity; they must be tried in special courts created for that purpose and generally composed of a large proportion of officials.

1. See para 191.

198. Chief characteristics: The chief characteristics of the system of administrative law prevailing in France are (a) The ordinary laws governing the relations of private individuals to one another differ considerably from the law governing the relation with the State and its officers. These laws are not passed by any legislature and are not in the form of a code; they are merely case-law made by officials, not by ordinary judges (b) Two different classes of Courts are created to regulate these two sorts of relations. The 'ordinary law Courts' take cognizance of the former class, while the "administrative Courts"¹ deal with the latter class. (c) Whenever there is a conflict concerning jurisdiction the voice of the administrative Court prevails. The ordinary Courts are not allowed to define the limits of their own jurisdiction. (d) The administrative law aims at protecting the servants of the State for acts committed by them in *bona fide* obedience to superiors or in discharge of official duties, from the control of the ordinary Courts. (e) The administrative Courts are composed of officials and they look upon the actions brought before them from the executive view-point. The spirit prevailing in these courts is different from that which influences the decisions of ordinary judges.

The protection thus afforded between 1800-72 was of three kinds; (a) An official could not be held responsible before a Law Court for an "Act of State." The expression means an act done *bona fide* with the object of furthering the interest or the security of the country. (b) Article 114 of the Penal Code protected (and still protects) an official from the penal consequences of violating the personal liberty of a citizen, if he acted under the orders of his superior. (c) Article 75 of the constitution of 1800 (now repealed) required that no official can be prosecuted or otherwise be proceeded against (*e. g.*, for damages) for any act done in pursuance of his official duties, unless permitted by the Council of State, the highest administrative Court, which also decided the questions concerning jurisdiction.

199. Second Period: 1830-1870: The Orleans Monarchy and the Second Empire: This period was, as a whole, a time of civil order. It was an age of peaceful progress. Owing to the development of Parliamentary government, the Council of State lost many of its political functions, but judicially it remained the great administrative Court. And, the system of administrative law also retained its essential features. This is evident from two facts: (a) The Council of State, although it rose in repute every year, never became a thoroughly judicial body. The members constituting it were drawn from official circles and were not entirely immune from official influence (b) Secondly, the amount of protection given to officials was not in any way diminished. Both the Articles mentioned above remained in full force despite the public opinion condemning the protection thus granted to official wrong-doers.

1- For the organisation of the 'Administrative Courts' see chapter VII.

200 Third Period: 1870-1908: The third Republic: During this period *three drastic changes* were made in the administrative law of France: (a) The above-mentioned Article 75 was repealed and contrary to French tradition has not been revived as yet. The reason is that the effect of that repeal is to a great extent nullified in practice. The effect of this repeal should be that for any act done in his official capacity an official can now be sued without obtaining permission from the Council of State, but the dogma of "separation of powers" came in the way. It had to be respected. And doing so, it still rests with the Council of State to decide as the conflict court whether a particular case fell within the jurisdiction of the ordinary Courts, or within that of its own. (b) The decisions of the Council of State received the obligatory force of judgments for the first time. (c) This change tended to diminish jurisdiction. The functions of the conflict court were hitherto performed by the Council. The former now became a separate body, so constituted as to represent equally the ordinary and Administrative Courts. These three reforms were carried out by legislation and met the requirements of the time. Though apparently sudden, they were an outcome of the change in public opinion, which was trying to assert itself for nearly a century.

201. Compared with the Rule of Law. When compared with the Rule of Law obtaining in England under the constitution, the administrative law of France suggests several points of similarity as well as of difference between the two. We may briefly notice these points.

202. A. (1) Similarity: (a) Similar ideas concerning the prerogative of the Crown were current in England during the 16th and 17th centuries. These ideas were put forward to give the Government special rights similar to those enjoyed by the French Executive under the rules of administrative law. The attempt failed, mainly because the whole scheme of such prerogatives was opposed to the traditional ideas of the English people, of equality before the law.

(b) Another point of resemblance is that the administrative law is like the common law of England entirely a judge-made law. Unlike the codified civil law of France, it is made up of judicial decisions.

(c) The evolution of the Council of State in France and that of the Privy Council in England also resemble each other. At first, they were executive bodies advising the Crown in the performance of his duties. Then they were converted into judicial or quasi-judicial bodies and finally transferred these functions of a judicial nature to its own committees. The judgments of the judicial committees of the English Privy Council are still published in the form of advice to the King,

(d) The history of administrative law in France and that of the English Law show a rapid development of case-law in both the countries. This is due

to the fact that judges in both the countries have always adhered to precedents, and the Courts have shown a tendency to follow the decision of superior tribunals.

202. B (2) Differences: (a) It often appears to a superficial observer that in England there are statutes, which contain regulations determining the position of the servants of the State and which can be identified with administrative law of France. But such a comparison will be misleading. While the English statutes of that sort, *e. g.*, the admiralty Act and the Army Act, are concerned only with one or the other class of the servants of the executive, *viz.*, the Navy and the Army, the administrative law affects every citizen. Nor can the latter be compared with such laws as Factory Acts or Education Act, which confer wide powers on the executive. The reason is obvious. The servants of the State acting under the authority of these laws will be personally liable if they exceed the authority and will be amenable to the jurisdiction of the ordinary Courts. The obedience to the orders of a superior cannot avail them as a successful defence. It will be otherwise under the administrative law of France. The relation of an individual citizen to the State under the law is regulated by principles different from those obtaining for the relation of one private citizen to another. Further, the case arising between a citizen and an officer will be tried by an administrative Court and the *bona-fide* obedience to a superior's order will excuse the latter entirely for his wrong act.

(b) It may also be supposed that such Acts, as mentioned above, try to introduce the principles of administrative law, into the law of England. Whatever may be the powers given to the members of the executive by these laws the extent of that power is determined in England by the ordinary Courts and not by any administrative Court. If the said ordinary Court decides that the order under which the official acted was not legal and valid, the latter will be exposed to the full penalty prescribed by the ordinary law for his wrongful act, while under the administrative law, no official will be amenable to the jurisdiction of the ordinary Courts for an "Act of State".

203. Merits and demerits of the two systems: We may now enumerate briefly the merits and demerits of both these systems. Let us first look at the English system of the Supremacy of Law. The merits of the system are: (1) that it secures individual freedom and (2) that it begets reverence for the Courts. There are also defects in the system. (1) The reverence for law tends to degenerate into rigid legalism, which may cause injury to the nation. Under this system the official and private citizens are placed on the footing of absolute equality. Some act of the former may be of such a nature as to cause injury to the country and may still go unpunished because it is not an offence under the ordinary law. Against this, however, it must not be forgotten that the system has prevented in England the development of the arbitrary powers of the executive. (2) Again the fact that *bona fide* obedience to a superior's order does

not afford any valid defence under the law, has often worked to the injury of public interest, e.g., in the case of detaining unseaworthy ships from proceeding on their intended voyage.

The merits, on the other hand of the system of administrative law are not so very apparent. (1) But the Council of State in France, has worked out in practice remedies for various abuses not touched by the ordinary law and has thereby secured personal freedom for the ordinary citizens to a great extent. (2) The distinction drawn by the Council, between damage resulting from the personal fault of an official and the damage resulting without such fault, has secured to a great extent the responsibility of official for their personal action. Individuals have obtained compensation from the state for the legitimate use of their power. The defects on the other hand, are very patent from the English view-point. (1) The increasing power of the Council must and does lessen the dignity of and respect for the ordinary Courts. The restriction imposed by the system of administrative law on the authority of the ordinary Courts have undoubtedly diminished the moral influence of the whole judicial system, which is so very prominent in England. The English Court from their undoubted power to intervene in matters of State, possess an amount of dignity which the French Courts do not. (2) The position of the official and their character is also extremely influenced by this system. In France, if an official obeys *bona fide* the commands of his superior, he is entirely exempt from all liability, even if the act involves a distinct breach of law and the jurisdiction of the Courts is ousted. In England, the servants of the Crown are not subject to any peculiar kind of law or amenable to special tribunals as regards their official duties. They get no protection whatever for their actions involving wrongs to private persons, and are, like any private citizen, accountable to Courts where the verdict is given by a jury. Under the circumstances, they are checked, unlike French officials, from becoming arbitrary and indifferent to private citizen's rights and privileges. (3) Again, however, the sympathetic administrative Courts may be, they cannot from their very nature give adequate protection to personal freedom. Their very existence proves that the servants of the executive need protection from the control of the ordinary Courts, against individual citizens. Even the distinction mentioned above as its merit, emphasizes the same fact, that it is a sort of new protection for the agents of the executive. (4) Besides, owing to the existence of this system and the principles involved in maintaining the same, the French law recognizes a large list of State acts, bearing on matters of policy, which do not fall within the jurisdiction or control of even the administrative Courts. Such acts are entirely without a remedy, even if they involved a wrong to private persons or infringement of their fundamental rights as citizens of the State.

3. Relation of the Rule of Law with the Sovereignty of Parliament.

204. Interdependent: The Sovereignty of Parliament and the Rule of Law are interdependent. (1) The supremacy of Parliament favours the supremacy of law, and (2) the predominance of rigid legality prevailing throughout the British political institutions necessitates and, in fact, thereby increases the power of Parliament. We may review this relation in detail.

205. (1) The Sovereignty of Parliament favours the Rule of Law : There are two peculiar features of the British Parliament which distinguish it from other sovereign powers. It is out of these features, that the relation arises. (a) We have already seen that Parliament is composed of three elements, viz., the Crown; the House of Lords and the House of Commons. The commands of this body can only be expressed through the combined action of its component parts; and the only method of expressing the said commands or will of that body is by means of Acts, formally enacted. It is only through formal and deliberate legislation that Parliament can convey to the outside world what it desires. A despotic monarch can invade the domain of the law of the land by his ordinances or decrees, promulgated through his servants: Parliament circumscribed as it is by various formalities and composed as it is of different elements can only express its will in a deliberate manner in the form of an Act. This naturally increases the authority of the Courts. As soon as a bill is passed into law and placed on the statute book, it becomes subject to judicial interpretation. The judges in interpreting such Acts construe them as they stand and do not attempt to go behind their history. This system establishes the power of the judges and contributes largely to the fixity of the law. (b) Secondly, Parliament never directly exercises executive functions. It does not appoint officials of the Government and never interferes in the details of the administration of any department. Although, in practice, Parliament has obtained and enjoys the right of appointing Prime-Minister and other Ministers of the Cabinet, these members of the executive are still, in theory, the servants of the Crown. Parliament does not enjoy even that much right in the appointment of other officers. And, in fact, in respect to members of the Cabinet, also, the choice of the electors plays a prominent part, as these Ministers are necessarily to be chosen from the party that has been returned to Parliament by the electors in a majority. Parliament has, therefore, never been able to interfere with the regular course of law. In fact, it has never dreamt of using its sovereign power for any such interference. Besides, Parliament has always been very jealous of and therefore looks with entire disfavour on any exemptions, granted to officials from the ordinary liabilities of citizens under the law of the land or from the jurisdiction of ordinary Courts. And, with this object in view, Parliament has always shown a tendency to protect the independence of the judges,

who, after they are once appointed are only removable from their office on an address of both Houses.

206. (2) The Rule of Law necessitates and increases the power of Parliament: We may now see how the supremacy of law necessitates the exercise, and thereby increases the sovereign power of Parliament. As we shall see in the next two chapters, under certain circumstances *e.g.*, in times of political disturbance, the rigidity of law constantly precludes the executive from taking immediate steps from fear of the Courts questioning the legality of their action. Public interest may then require recourse to exceptional legislation granting discretionary powers to the executive. Thus in times of disturbance or civil war the executive is called upon and expected to keep the turbulent elements in check and maintain peace and order unimpaired. To fulfil this function, the ordinary law of the land may not suffice. The circumstances may require that the disturbance be put down by force, or that the ring leaders be arrested and imprisoned without any judicial trial. Even some of them may have to be arrested or even expelled on mere suspicion. On such occasions, the executive either asks the Parliament to grant them wider powers than what they already possess or if the circumstances do not permit them to wait until such powers are formally granted to them by Parliament, they assume the necessary powers and exercise them, for the time being on their own responsibility. Generally, Parliament grants them the power asked for by means of an emergency and temporary legislation, taking into consideration the particular circumstances under which they are needed. This is one way in which Parliament is called upon to exercise its sovereign power. The other way, and the more important one, in which the exercise of its sovereign power is necessitated, is when it is called upon to pass an "Act of Indemnity." The real nature and the significance of such acts must be properly understood by us. When the circumstances necessitating arbitrary powers in the hands of the executive disappear, that is, when the disturbances cease and everything returns to normal conditions, the emergency and temporary Acts passed by Parliament will be, of course, repealed. Such repeal will expose the executive officer to penalties imposed by the ordinary law for their wrongful acts committed during the disturbances. The special authority *viz.*, the emergency legislation under which they committed these acts, is extinguished by the repeal of such Acts, and then they are liable under the ordinary law. There is nothing else to protect them against the jurisdiction of ordinary Courts and the provisions of ordinary law. Again, in cases where they could not wait for the formal sanction of Parliament, in the shape of emergency legislation, they will be liable under ordinary law, for their arbitrary and wrongful acts, as soon as the same are committed. Parliament comes to their aid in such cases and protects them from the rigours of ordinary law by passing an Act of Indemnity. Such an Act puts to an end all legal actions, either civil or criminal, against them for

acts committed by them. The Act is the highest manifestation of the Sovereignty of Parliament inasmuch as it legalises illegalities. It clearly proves the relation of interdependence between the Rule of Law and the Sovereignty of Parliament. It is the rigid rule of ordinary law that necessitates the exercise of Parliament's sovereign power in this respect. Again, an Act of Indemnity is the expedient for reconciling the Sovereignty of Parliament and the Rule of Law with the free exercise of arbitrary and discretionary power by the executive at some critical times. It, however, does not mean that the despotic powers of the Crown are transferred to Parliament in this form. That body has its own external and internal limitations, and cannot afford to be despotic; it will be entirely against its own nature and character to do so. And, the executive acting under its authority cannot, also, afford to be despotic, in the exercise of the arbitrary power so granted by Parliament. Since these powers can only be exercised either under an Act of Parliament already passed or in expectation of an Act of Indemnity to be passed by the same body, the executive is required to be very careful in the measure it may adopt during critical circumstances. Again, even when armed with the widest authority under an Act of Parliament the executive necessarily places itself under the strict supervision of the Courts, whose duty it is to interpret the extent to which it is empowered to go. The powers granted by Acts of Parliament are circumscribed and limited by the words and expressions used and the judges put, as a rule, very strict interpretation on such powers, which go beyond and, in fact, form exceptions to the fundamental rules or principles established by common law.

- I. See Chapter V.

CHAPTER X

Rule of Law in Practice

207. Two Maxims: We may now proceed to see how the rule of law applies in practice. The right of citizens as against each other stand on the same footing as the rights of citizens against any servant of the executive and are governed by the same rules of ordinary law. Both private citizens and public officers are subject to the same penalties of law for their wrongful act. These rights of individual citizens are derived from the application of the rules of ordinary law and the law of the constitution is the result of these rights. This law of the constitution is enforced and maintained by the courts by strict adherence to two maxims, viz., (1) equality before the law, and (2) personal responsibility of every wrong doer. The former makes every one liable as an ordinary citizen and amenable to the jurisdiction of the ordinary Courts. The latter excludes obedience to the order of a superior as a defence of the subordinate, who is guilty of any breach of law.

208. Various subjects: There are some subjects which belong apparently to the law of the constitution, and are founded at bottom upon the rules of civil or criminal law of the land. There are others which though primarily deduced from the rules of ordinary law form a foundation of the constitutional law of the country. The subjects belonging to the former class are four, viz., (1) Martial Law; (2) Army; (3) Revenue, and (4) Legal Responsibility of Ministers.

1. Martial Law

209. An Exception: As the state of things prevailing under what is known as "*Martial Law*" forms an exception to the general rule, that no man may be punished or imprisoned, except for a breach of law, proved in a legal manner, before an ordinary Court of Law, it is necessary to consider what "*Martial Law*" is and how it is admitted by and reconciled with the law of the United Kingdom.

210. Martial Law and Military Law: Before the passing of the Mutiny Act, the Crown by his prerogative could exercise martial law in time of war, but not in time of peace. The term "*martial law*" was then applied alike to what is now known as "*Military Law*", viz., that code of laws to which the soldier as distinct from the civilian, is subject for the maintenance of discipline and which now derives its authority from the Army Annual Acts; and also to the sense in which the term "*martial law*," is now understood, viz., that authority which is exercised by the military by virtue of the royal prerogative in time of war, insurrection, riot or rebellion to restore peace or preserve public safety. After the passing of the Mutiny Act, and the establishment of a stan-

ding army in time of peace on a legal footing, the two terms "martial law" and "military law" became distinct. The former, *i.e.*, "martial law" is now always understood to apply to those exceptional methods which are adopted to preserve discipline and order during war, riot or rebellion. The term "military law" now applies to the code of laws by which discipline is maintained in the army at all times.

211. Temporary Suspension of the Rule of Law: The term "martial law" itself, as opposed to "military law" is understood to apply to two quite different things: -(1) In its proper sense, as understood on the Continent, it means *temporary suspension of the rule of ordinary law, i.e.*, of Civil Government, and government of the realm or a part of it by military tribunals, instead. It applies, in short, to that state of things which exists, when by virtue of the prerogative, the military authorities in time of war, riot or rebellion claim the cognizance of certain offences by means of military tribunals to the exclusion of Civil Courts. In such a state of affairs, which is akin to what is known in France as a State of Siege (*stat de siege*) and which is fully recognized by the Articles of the French constitution, civil jurisdiction is handed over to military tribunals. Such a state of things is utterly unknown to English Law. There is nothing in the United Kingdom equivalent to a "State of Siege" in France. In this sense, martial law has not been put in force in England by virtue of the prerogative, since the days of Charles I. It was, however, proclaimed by statutory authority in Ireland in 1799. In cases, where it is so proclaimed by authority, *i.e.*, by virtue of an Act of Parliament, little or no difficulty presents itself. But in cases where without any statutory authority, the officers of the Crown proclaim Martial Law and the military tribunal acting under the authority of such proclamation exercises jurisdiction over certain offences and sentences civilians to death, imprisonment or fines, it becomes necessary to examine how far the prerogative of the Crown to issue such proclamation extends under the law of the British constitution.

212. Prerogative and Martial law: The Petition of Right did not in terms condemn martial law in time of war, but only in time of peace. The Mutiny Acts are only necessary to authorise the Crown to apply in time of peace those regulations which the Crown may by prerogative apply in time of war or of rebellion, which amounts to war. The case of *Ex parte Marais*¹ illustrates the point distinctly. Marais residing in Cape Colony was arrested and imprisoned under a warrant from the military authorities, martial law having been proclaimed in the district previously. He presented a petition to the Supreme Court of the colony, alleging that his arrest and imprisonment were illegal. The application was refused, whereupon he appealed to the Privy

1. (1902) A. C. 109 (115),

Council. The Earl of Halsbury, L. C., observed during the course of his judgment: "It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of *actual War* be established and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities. The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." It may be noticed here that Acts of Indemnity were passed by the Cape Parliament to indemnify the officers and persons acting under the authority of proclamations. It is evident from this that the proclamation of military law is very grudgingly recognised in time of war or in circumstances amounting to war, but not in time of peace, as a mere necessary evil, by the English Courts. Under the French constitution, however, the state of siege may be declared without any such limitation. When it is so declared all constitutional guarantees for the rights of citizens become suspended, the ordinary law is also suspended and any man will be liable to be arrested, imprisoned or sentenced to death by military tribunals.

213. Right to resist force by force : (2) Secondly, the term "martial law" means the *common law right of the Crown and his servants* together with all citizens, not only to resist and repel force by force but also to do all such acts as fall within their common law duty in order to restore peace or suppress insurrection, riot or rebellion. In this sense "martial law" is fully recognised by the law of England. All public officers and citizens are entitled under this right to use so much force as is necessary for self-protection or for the suppression of insurrection, riot or rebellion, even to the extent of taking human life. But this right is strictly limited by necessity. In such cases, officers and citizens are not only entitled to use force, but it is their public duty also to use all the powers which the law allows in order to maintain the King's peace and for a breach of this duty they will be criminally liable. The case of *Rex v. Pinney*¹ illustrates this point. Mr. Pinney, the Mayor of Bristol, was prosecuted for not having done all in his power to suppress the riots which occurred in that city in October 1831. He was held liable by Littledale J. who said in his judgment: "He had not done all that could reasonably be expected from a man of ordinary prudence, firmness and activity, under the circumstances in which he was placed." In such circumstances the measure of a man's right to use force is co-relative to his duty, he will be criminally liable for acts done in excess of his duty, and, on the other hand, he will be liable for omissions of duty amounting to criminal negligence.

1. (1832) 3 B & Ad. 947

214. Individual liability: It is evident from this that individual liability attaches to both officers and civilians alike in such cases. They are not exempt from their liability, as ordinary citizens, at law, for their conduct. Each one of the persons whether a soldier or a civilian employed in such a task is liable for his conduct and so is a person, who does not help, liable for non-performance of his duty. Each one of them can employ only such force as is required by the necessity of the case. If excessive or unnecessary force is used they will be called to account before a judge and a jury. The occasion on which force is to be employed and the kind and degree of force which it is lawful to employ are determined by the necessity of each case. The commands of a superior are no justification for unnecessary or excessive violence, unless the command is not necessarily or manifestly illegal, though in time of war, the command of a superior officer might be held an absolute justification for all acts done, whether manifestly illegal or not¹.

215. Two Cases are worthy of our notice in this connection: (1) *Wolfe Tone's case*:² Wolfe Tone, an Irishman, took part in the French invasion of Ireland. He was arrested and a Court Martial in Dublin tried and sentenced him to death. He held, however, no commission as an English officer; his only commission being one from the French Republic. A writ of *Habeas Corpus* was applied for and it was granted by the Court, on the ground that not being a military man he was not subject to the jurisdiction of a Court Martial and hence cannot be punished by the same. (2) With reference to the *Jamaica Insurrection*³ the nature of martial law as known to English law is well expressed in the opinion of two eminent lawyers, Edward James, Q.C. and Fitz James Stephen, Q.C. Their views may be summed up thus: (a) Martial law is the assumption of absolute power, by the officers of the Crown, exercised by military force for the suppression of an insurrection and the restoration of order and lawful authority. (b) The officers of the Crown and all citizens also are justified in any execution of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for this purpose. They are, however, not justified in the use of excessive or cruel means and will be liable for such excess, civilly and criminally. And, after resistance is suppressed and ordinary Courts reopened they are not justified in inflicting punishment.⁴ If they use their power wantonly or without due regard to humanity, they will be liable even though the martial law is in full force and an Act of Indemnity is passed. (d) In fact, the Courts Martial are not courts at all. They are justified, with any form and in any manner, to do whatever is necessary to suppress insurrection and restore peace. But they will be personally liable for acts which they commit in excess of that power, even if they act in strict accordance with the Mutiny Act and the

1. *Keighley v Bell*; (1866) 4 F. and F. 790. 2. (1798) 27 St. Tri. 613. 3. *Forsyth*. P. 551. 4. See *Wolfe Tone's case*.

Articles of War. It is doubtful, however, whether prisoners can be sentenced to long terms of imprisonment unless such sentences are confirmed by an Act of Parliament. In sentencing people to long term of imprisonment, Courts Martial in fact, belie the necessity under which alone jurisdiction of Courts Martial can lawfully exist in civil society.¹

216. Conclusions: The following conclusions may be deduced from the foregoing discussion on the subjects of martial law: (i) The Crown's prerogative to declare martial law does not exist in time of peace, at all. Its extent in time of war has not so far been judicially determined and the only justification for its existence is the necessity occasioned by an actual state of war or riot or rebellion amounting to war. (ii) The exercise of force is strictly limited by and must cease with the necessity which gave rise to it. The civil courts will grant writs of *habeas corpus* to persons detained in military custody after the war is over. (iii) On such necessity being shown, Parliament will either sanction the use of force or pass an Act of Indemnity subsequently. (iv) When a state of war *actually* exists and is recognized by the ordinary Courts, they have no jurisdiction over the action of military authorities, even though they may be sitting for some purpose. (*Ex parte Marais*). It is, however doubtful whether sentences of fine or imprisonment will be valid without being confirmed by Parliament. (v) The officers and citizens will be liable, both civilly and criminally, for act, done in excess of authority.

2. The Army

217. Subordinate to Ordinary Law: The army in England derives its existence from and is subordinate to the ordinary law of the land. It consists of two main divisions; viz., (i) the Standing Army, technically known as the Regular Forces, and (ii) the Territorial Forces, or the Militia—a voluntary force—as it was known in mediæval times.

218. The Standing Army: Historically, the Militia is an older institution than the permanent army. At first sight the existence of a standing army appears to be inconsistent, with the existence of a free government. A body of paid soldiers is absolutely subject to the commands of superior officers and may as such help to establish despotism in the country. This sentiment was predominant in England prior to the Revolution of 1688 and for long time subsequent to that Parliament did not grant recognition to a regular standing army. Before the regular forces came to be recognized upon legal footing, there existed two legal kinds of military forces at the disposal of the Crown, viz., (i) the old *feudal array*, resulting out of the tenures by military service, and (ii) the old *train band* which became known as the *Militia*. When military service was commuted into money payments, the feudal array ceased to

1. See Mr. Sergeant Spankie's opinion: *Forryth* P. 211.

exist. The Militia, could legally be used only for domestic or defensive purposes only and could not be sent abroad.

219. Origin and constitution : The danger of foreign invasion necessitated the maintenance of a standing army, the existence of such a body being absolutely necessary for national defence. Parliament, however, could not be persuaded to sanction such an army, for a long time. Charles II maintained a force of Guards to the Sovereign, for the first time, with Parliamentary sanction. James II increased their number to 30,000 on his own authority. The traditional notions of law and government under which Englishmen are brought up for the past so many centuries, helped to solve this practical difficulty. Parliament could see that the maintenance of a standing army was an absolute necessity and for that reason individual liberty must be sacrificed to a certain extent for the preservation of national independence. The way they found out was to vote these grants annually, thus keeping a constant check on the power of the King. The army is now maintained on a legal footing by means of Annual Acts, known, down to 1881, as Mutiny Acts, and since then as Army Annual Acts. The Act re-enacted every year with necessary amendments or new clauses added, and with the regulations made thereunder forms the code of military law for the discipline of the forces. It may be noted here that the Crown has no power to compel enlistment in time of peace. The Regular Forces consist of six divisions. (i) *The Regular Forces*: After enlistment a soldier is required to serve in this division for a term of seven years. The term may be extended, if necessary. (ii) *The Army Reserves*: This division consists of men (a) who have served in the Regular forces and are transferred into the Reserve or (b) enlisted or re-engaged in pursuance of the Reserve Forces Act, 1882. (iii) *The Militia or Special Reserves*: The division is composed of men who have not served in any of the Regular Forces. (iv) *The Marines*: These form part of the Regular Forces and serve in the navy. (v) *The Indian Forces*: This division is composed of officers and men of the regular British Army serving in India, and the Indian Army proper composed of Indian troops under British Officers. (vi) *Colonial Forces*: These are either forces raised by order of His Majesty beyond the limits of the United Kingdom and India.

220. The Territorial Army : The Territorial Army or the auxiliary forces consisted of the following : (i) *The Militia* : The term, as has already been seen, was applied to the old train bands in mediæval times. Prior to the passing of the Territorial and Reserve Forces Act, 1907, there were two kinds of Militia, general and local, raised on a voluntary system. (ii) *The Yeomanry* consisted of mounted volunteer troops. (iii) *The Volunteers*: All these three have now become merged in the Territorial Force. It is formed by voluntary enlistment. The members of this army are subject to the same military law. There is, however, one exception. It cannot be compelled to

serve outside the country. Such an army can lawfully be embodied only in times of national danger. In case of urgent necessity this army can be embodied even without the sanction of Parliament, but its continuance will ultimately depend upon the Act passed by Parliament.

221. Two-fold liability of a soldier: We have seen above, how Parliament reconciled the maintenance of a standing army with the existence of a free government by providing a constant check on the power of the King by means of Annual Acts. In doing so, they adhered to one fundamental principle of English law, that a soldier may be subject to special regulations as a soldier but thereby he is not exempt from his ordinary liabilities as a citizen. The Army Annual Act lays down this principle. An analogy to this situation is afforded by the position of the Clergy. A clergyman belonging to the Established Church is subject, like a soldier to two kinds of rules. As a clergy he enjoys the privileges and is bound by the restrictions peculiar to his order; but at the same time he is also subject to the ordinary law of the land as any other ordinary citizen. In the case of Ecclesiastical Courts also, as in the case of Courts Martial, it is the common law Courts that determine the legal limits of their jurisdiction. The liability of a soldier, therefore, is twofold: (1) as a citizen, and (2) as a soldier.

222. (1) A soldier's position as a citizen: It is the fixed doctrine of English law that a soldier in the standing army, *i. e.*, a person subject to military law, is in England subject to all the duties and liabilities of an ordinary citizen. The Army Act, under the provisions of which he is enlisted in the army, clearly lays down that he is not exempt because of such enlistment, from the ordinary process of law. This provision is a key to English legislation with regard to the standing army, while employed in England. A soldier, no doubt, undertakes many obligations by his enlistment, in addition to the duties incumbent upon a civilian. But because of these additional obligations he cannot escape from any of the duties of an ordinary citizen.

(a) **Criminal liability:** A soldier is subject to the same criminal liability as a civilian. While he is in the British Dominions, and either murders or robs anybody, he will be tried by a competent civil Court; his military character will not save him from the consequences of such acts under the ordinary law.

(b) **Civil liability:** His liability under the civil law is also the same as that of any other ordinary citizen. In respect of debts, however, he enjoys certain privileges. He can claim exemption from being forced to appear in Court and he cannot be arrested for any debt not exceeding £ 30.

(c) **Conflict of jurisdiction:** Where there is a conflict of jurisdiction between a civil and a military Court, the authority of a civil Court prevails. An acquittal or conviction by a Court Martial for manslaughter or robbery is no bar to a trial for the same offence before the Court of Assizes. But an

acquittal or conviction for an offence by a competent civil Court will certainly be a bar to a trial for the same offence before a Court Martial.

(d) **Obedience to superior no defence:** When a soldier is tried on a charge of crime, obedience to a superior's order is not of itself a defence. A soldier is, no doubt, bound to obey any lawful order which he receives from his military superior. But he cannot avoid his responsibility as a civilian for breach of the law, by pleading that he committed the breach in *bona fide* obedience to the orders of his superior officer. His position is, therefore, difficult. He is liable to be shot by a Court Martial if he disobeys the order and to be hanged by the judge and jury if he obeys it. If the order of a superior officer is justified by the civil law, a soldier can act in obedience to it without any fear of involving a breach of duty as citizen. In fact, he is bound to carry out such an order. For instance, an officer orders his soldiers to fire upon rioters during a riot. The order is justified by the fact that the disturbance must be put down and no less energetic action will be sufficient under the circumstances. A soldier is bound to carry out such an order both from the legal and military points of view. Being a lawful order, he will be only performing his duty as a soldier and as a citizen in carrying out the same. On the other hand, if an order cannot be justified by the civil law, the duty of a soldier is to obey the law of the land even at the risk of disobeying his superior. Supposing there is a political excitement and an officer commands his soldiers to arrest and shoot down a popular leader. No crime has been proved against the leader and he is not tried by any Court. He is only suspected of treasonable designs. If the soldiers obey the command, both they and their officer will be guilty of murder and liable to be hanged when tried by the ordinary Court. The obedience to such an order will not save a soldier from its consequences. His civil liability, therefore, turns upon the nature of the order he obeys. If the officer giving it is legally justified in doing so, well and good; if not, the officer and his men, all are liable. As laid down by Stephen J., if a soldier reasonably thinks that his officer had good grounds for giving an order he will be protected, if he obeys the same. For example, if an order is given to fire into a disorderly crowd, which appears to have been engaged at the moment in acts of dangerous violence, he can reasonably think that the officer had good grounds in giving such an order. But if he is ordered to fire a volley on a peaceful meeting of citizens, where there is no disturbance of any kind and none can reasonably be apprehended, then a soldier cannot reasonably think that his officer had good reasons in giving that order and must take the consequences if he obeys the same. If the doctrine, that a soldier is bound under all circumstances to obey the commands of his superior officer, is carried too far, it might prove fatal to military discipline itself. A soldier, in that case, would be justified, in shooting down the Colonel by the commands of his Captain. As this action cannot be justified, so also, shooting of unoffending civilians

will not be justified. No doubt, the position of a soldier is difficult, being subject as he is to two jurisdictions. He is under a double necessity of preserving on the one hand the rule of law and on the other the discipline of the army. The hardship so caused is much diminished by the exercise of a power of the Crown to nullify the effect of an unjust conviction by means of a pardon.

223. (2) A soldier's position as a member of the Army: As has been stated above, a person on his enlistment as a soldier becomes subject to military law, *i. e.*, the provisions of the Army Act and the regulations made under it. This law is very rigorous and requires strict discipline. Hence, acts which if done by a civilian would be either no offence at all or only slight misdemeanours, would become serious crimes if done by a soldier. For instance, an insult to or assault on an officer will expose a soldier to serious punishment. He occupies a position totally different from that of a citizen. He is subject to the liabilities imposed by military law, in addition to his duties as a citizen. But even as regards this position of his, as a military man, the rule of law is not excluded from the army, at any rate in time of peace.

(a) **Jurisdiction of Civil Courts:** Enlistment, by which a person becomes subject to military law, is a contract and hence subject to the jurisdiction of the ordinary courts. It being a civil proceeding, the Courts have right to enquire whether a particular person is duly enlisted or whether he is entitled to his discharge.

(b) **Supervision of Courts-Martial:** The ordinary Courts exercise supervision on Courts-Martial as well as on officers, when the former exceed their jurisdiction or the latter do any acts not authorised by law. This supervision may take the form either of civil or of criminal proceedings, as the particular case requires. Civil proceedings may either be preventive or remedial. The Court may restrain the commission or continuance of an injury by injunction or afford a remedy for injury already suffered. Criminal proceedings are in the form of an indictment for various crimes, such as, assault, imprisonment or murder. The Courts-Martial are restrained by means of writs of prohibition and remedy against acts of individual officers is afforded by means of writs of *habeas corpus*, addressed to an officer, *e.g.*, a gaoler in whose custody the alleged offender is detained.

(c) **Check by Parliament:** The discipline and continual maintenance of the army depends entirely upon the Army Act, which is to be re enacted every year. By this process Parliament is able to exercise supervision, and its will being expressed in the form of an Act, the army governed by that Act, comes under the jurisdiction of ordinary Courts. If the Act is not re-enacted, it will go out of force automatically and no soldier will be bound by it.

224. Position of a soldier in the Territorial Army: This force, as has already been stated, is raised by voluntary enlistment. The members of

this body are not subject to military law, except, when they are in training or when the force is embodied, *i. e.*, it is converted into a Regular Force. Even when the force is so embodied, it cannot be legally required to serve abroad outside the limits of the United Kingdom. With regard to this force also, care has been taken to ensure that it shall be subject to the rule of law. It is a force recognised by the constitution and relied upon by Parliament in the past as the only national army for the defence of the country. It is also constituted by an Act of Parliament and hence comes under the jurisdiction of ordinary Courts. It can only be embodied into a Regular Force in case of imminent national danger or a great emergency. Except, under these circumstances, the embodiment cannot be carried out without the sanction of Parliament. When it is so embodied it becomes a regular force and all that has been said about the position of a soldier ere this applies equally to the members of this territorial army.

3. Revenue

225. National Income : The supremacy of law is also evident in the domain of national income. The transaction appertaining to the collection and expenditure of revenue in the United Kingdom are governed by strict rules of law. This subject can be considered under three separate heads, *viz.*, (1) the sources of public revenue, (2) the authority for expending public revenue and (3) the securities provided by law for the due appropriation of public revenue, that is, for its being spent in the exact manner which the law directs.

226. (1) Sources of public revenue : Historically speaking, there are two divisions of the sources of public income in the United Kingdom. (a) The revenue arising from Crown lands, droits of admiralty and the like is known as *hereditary or ordinary revenue*. This forms a very insignificant portion of the national income and does not amount to more than £500,000 a year. Again it does not belong to the Crown at the present day, although it continues to be known as 'hereditary revenue'. The Crown is paid a fixed Civil List amounting to £470,000/- annually for the support of his dignity and for the maintenance of Royal household and the income derived from the hereditary source goes to swell the national exchequer. (b) The revenue depending upon taxes imposed by Parliament is known historically as the *extra-ordinary revenue*. In reality, it is the ordinary revenue. Being wholly raised by taxes imposed by Act of Parliament, it is also known as *Parliamentary revenue*. In a normal year, before the Great European War, the national income of the United Kingdom from this source amounted to about £145,000,000/-. This amount is raised in two ways: (i) *By permanent Acts of Parliament :* The history of the struggle between Parliament and the Sovereign in the matter of levying taxes likely to

engender an idea that no taxes could be levied if Parliament does not meet. No doubt, no taxes can now be legally levied without the sanction of Parliament. It is, however, wrong to believe that no taxes will be legally payable if Parliament ceases to meet. In fact, a considerable portion of the national income will flow into the exchequer every year, even if Parliament did not sit at all. This is because almost three-fourths of the revenue comes from taxes imposed by *permanent Acts*. (ii) The rest of the income is derived from taxes imposed by *annual Acts*. These taxes, notably amongst them the income tax and the customs duties are revised and voted by Parliament every year. On the other hand, the land tax, the excise, the stamp duties, and others are levied by permanent Acts. If Parliament did not sit and renew the annual Acts the people could not be legally compelled to pay the taxes imposed by them. In short, this much must be borne in mind that not a single penny can be obtained by the Government by way of tax unless an Act of Parliament, whether permanent or annual, sanctions the same.

227. (2) Authority for Expenditure: The real check by Parliament over the nation's income comes in the matter of expending the amount so collected. At one time, an idea prevailed that if taxes were imposed by an Act of Parliament, the income arising from such taxes was in reality a grant or gift to the Crown by Parliament, and the Crown or his Ministers can spend the same in any manner he or they liked, without any further sanction from Parliament for such expenditure. That idea has now been exploded. Public revenue is not the private property of the King and is not voted by Parliament to go into his pocket. At one time the salaries of the Judges and other charges were mixed up with the King's private expenditure but they are now separated from the Civil List and the whole of public revenue now forms the national income, out of which not a penny can be spent without the authority of an Act of Parliament. The whole revenue is received at the Inland Revenue Office, where moneys, paid as taxes are collected into a large box. The amount so collected is removed by two Officers of the Bank every day to the Bank of England and paid there to the Exchequer Account. This account cannot be operated upon and monies cannot be withdrawn therefrom for expenditure except in accordance with an Act of Parliament. (a) As it is in the matter of collecting revenue, so also in the matter of expending the same, *permanent and annual Acts* play their part. Civil List, interest on National Debt, the salaries of Judges and other charges are paid under the authority of permanent Act of Parliament. (b) In other cases, *e. g.*, for the support of the army and navy, the authority to make payments is given by an annual Act, known as the Appropriation Act, which determines the mode in which the supplies granted by Parliament, are to be spent. In either case, whether the expenditure is authorised by a permanent Act, or by an annual Act, this much is certain that all payments made out of the national income are

made by and under the authority of some Act of Parliament. The details of method by which the supplies are annually voted and appropriated have been treated by us already in a previous chapter¹ and need not be repeated here. What is necessary to bear in mind here is that both the collection and expenditure of revenue are regulated by Parliamentary enactments.

228. (3) Security for proper expenditure: What is there, however, to show that taxes paid by the people and authorised to be spent by Parliament, will be spent in the exact manner and for the objects specified, in accordance with the will of Parliament? This is quite a natural question to ask. Unless there is a real check placed on the authority of the Crown or his Ministers, in this respect, the intention of Parliament could be easily flouted. This check or security is provided by an elaborate machinery of control and audit. Under this system, the Government cannot obtain even a penny of public money, without the authority of persons who are quite independent of the Cabinet and whose duty it is to see that no payment is made out of the exchequer without legal authority for the same. These special officers, who pay the money, also, come to know ultimately how the moneys paid by them are spent by the government departments concerned. It is also a part of their duty to report to Parliament, if any expenditure appears to them to be in contravention of the authority given by Parliament. The chief officer, who runs this machinery and is the centre of this system of Parliamentary control and audit, is the *Comptroller and Auditor General*. He and his immediate assistant, the Assistant Comptroller and Auditor General, are appointed by a Patent under the Great Seal, hold their office during good behaviour and can be removed only on an address from both Houses of Parliament. He cannot be a member of either House and cannot take part in politics. He combines in his person two duties. As Comptroller, he controls the issue of public money to government departments, and as Auditor, he supervises how the amounts so issued by him are spent by them, that is to say, he audits their accounts. (a) In his capacity as *Comptroller-General* he is bound to see that the moneys paid into the Bank of England are not paid out, except under the authority of an Act of Parliament. The Treasury cannot obtain from the Bank any amount unless the same is authorised to be paid by the Comptroller-General. Whenever the Treasury wants money, it makes a requisition to the Comptroller-General authorising the payment of a definite sum from the public moneys deposited at the Bank. Before granting the necessary credit in accordance with such requisition the Comptroller-General satisfies himself that such payment is authorised by Parliament, either by a permanent or an annual Act, and that all legal formalities, necessary for such a withdrawal from the Bank are gone through. Unless he is so satisfied he will not grant the

1. See Chapter IV.

credit required and the Bank will not pay without his authority. The strict observance of legal formalities gives an opportunity to the Comptroller-General to prevent irregularities on the part of the Government. There is, however, a danger of its being pushed too far, as it happened at the time of war with France in 1811. Parliament had granted a million pounds for the navy, but the King being a lunatic no authority could be legally given to the Comptroller-General under the great Seal or the Privy Seal, unless a Regency Bill was passed. The then Comptroller-General, Lord Granville, refused to grant credit, until the formality was gone through and the Ministry had to get the Regency Bill passed before they could obtain payment of the amount. (b) *As Auditor-General* he audits all public accounts of government departments and reports them to Parliament every year. In the beginning of every session of Parliament accounts of expenditure under the Appropriation Act are submitted by him to the public Accounts Committee of the House of Commons appointed to examine these accounts. The committee examine these accounts very minutely and strictly and report the result of their discussions to Parliament. Under this elaborate system very accurate accounts are kept, every penny of the national income is scrupulously guarded and expended only under the authority of some Act of Parliament.

229. Check on Comptroller-General: It may happen that the Comptroller-General may raise difficulties and refuse grants so as to stop entirely the ordinary transaction of public business. Two means are open to overcome his perversity. One of them, already stated, is an address from the Houses to remove him from office. Another is by a writ of Mandamus from the High Court to compel him to perform his duties. Such a course has not been tested as yet, since no such necessity has arisen in the past. But the fact that the executive may have to take this course, in case of need, shows clearly to what extent the transactions concerning the revenue are governed by the ordinary law of the land.

4. Legal Responsibility of Ministers

230. Two kinds of Responsibility : The Ministers of the Crown in the United Kingdom are subject to two kinds of responsibility, viz., (1) to the ordinary law of the land, and (2) to Parliament. The first kind of responsibility, i.e., legal responsibility, is governed by the rules of ordinary law. Of course, there is no clear enactment to the effect that all acts of the Crown must be done by and through some Minister, but, in practice, the rule does exist in England. There is nothing in the English constitution like explicit statement as is found in most foreign constitutions, that the acts of the Sovereign must always be done by and through a Minister. The acts of the Crown are, in reality, the acts done in the name of the Crown in the United Kingdom, and are expressed in writing which are always countersigned by a Minister.

231. Acts of the Crown: The Royal will in the United Kingdom is expressed in three ways (i) by Order in Council; (ii) by Order, Commission or Warrant under the Sign Manual; and (iii) by Proclamation, Writs, Patent and other documents under the Great Seal. The Royal will so expressed to have any legal effect must in general have the assent of or must be expressed through some Minister, who will be held responsible for it.

(i) The Order in Council is made by the King, by and with the advice of his Privy Council. As only three members of the Privy Council can make the legal quorum, in practice, these orders are made in consultation with and at the instance of Ministers, who are Privy Councillors. Those members present at the meeting when the order was made, are held responsible for the same in law.

(ii) The order, Commission or Warrant under the Sign Manual are made also at the instance of one or more ministers. It must be countersigned by one or more of them, and they must bear responsibility for the same.

(iii) The documents under the Great Seal are issued generally on the responsibility of the Chancellor.

232. By and through a Minister: It is evident from this that all acts of the Crown must be done by and through a Minister. The Minister who takes part in so giving expression to the Royal will is himself legally responsible for the act. He cannot get rid of his liability by saying that he acted in the manner he did, in obedience to the orders of the Crown. If the act done is illegal, the Minister is personally liable to civil or criminal proceedings in a Court of law. The old procedure of impeachment, is now obsolete but the result originally aimed at by impeachment can now be obtained, and certainly in a more easier way, by means of proceedings before an ordinary Court.

The principle of law is now well-established that the Crown can act only in accordance with certain prescribed forms, which necessarily require the co-operation of a Minister, who becomes not only morally but legally responsible for the act. Thus indirectly, every action of the executive, and in effect also of the Crown, is brought under the supremacy of the ordinary law of the land.

233. (2) Parliamentary Responsibility of Ministers : Another sense in which the Ministers in the United Kingdom are responsible is that they are individually and collectively responsible to Parliament. This means that the Ministers are liable to lose their offices, if they cannot retain the confidence of the House of Commons. This is a matter depending upon the convention with which the law has no direct concern. If the Ministry, upon losing the support of the majority in the House of Commons, does not resign, or, in the alternative, does not appeal to the country by advising the King to dissolve Parliament and order general election, nobody in the country has got power to proceed against them in a Court of law, for that breach of the convention. The King, however, may refuse to listen to their advice for dissolving Parliament

and may ask for their resignation straightway without giving them a chance to appeal to the electors.

234. Parliamentary and non-Parliamentary Executive : This Parliamentary responsibility of the British Executive distinguishes it from the executives in other countries, where no such responsibility exists. Representative government exists at the present moment in many countries, but it does not mean one and the same thing everywhere. It generally exhibits two types, as considered from the viewpoint of the relation between the executive and the legislature. (i) Under one form of representative government, the legislature, or at least the elective portion thereof, enjoys the power of appointing and dismissing the executive, which is chosen from among its own members. Such an executive is called a "*Parliamentary Executive*." (ii) Under the other form of representative government, the legislature neither appoints, nor dismisses the executive, which may be called a "*Non-Parliamentary or fixed Executive*." A few points may be noted here in connection with this subject.

235. New principle of division : (1) The distinction between a Parliamentary and a non-parliamentary executive affords a *new principle of division* between the constitutions of different countries. Bearing that distinction in mind we can classify the constitutions of countries like the United Kingdom, France and Italy into one group and those of the countries, like the United States of America and Switzerland into another group. The nature of executives in England, France and Italy is the same. They are all parliamentary executives appointed and removable by the legislature. On the other hand, the executive in the United States is not appointed by the legislature and cannot be dismissed by it.

236. Constituent Parliament not necessary : (2) The nature of the executive also affects in a way the sovereign power of the legislature. It may safely be asserted that the British Parliament is really a sovereign legislature because it possesses the power of appointing and dismissing the Cabinet, at least in practice if not in theory, the British Cabinet is still appointed and dismissed by the Crown, but in practice the support of the majority in the House of Commons is absolutely necessary for its continuance in office. This is in fact, the ultimate aim of parliamentary government. It may be said to have reached its full development when the tenure of office of the executive is made to depend upon the pleasure of Parliament. The government then becomes in fact, the government by Parliament. It, however, is not absolutely necessary that a Parliament to reach this stage in its development must also be a sovereign or constituent Parliament. A Parliament need not have the power to change the constitution of the country, in order to have a parliamentary executive. The Dominion Parliament of Australia or Canada are not sovereign parliaments in the sense in which the British Parliament is, and yet they control

their executives. So the combination of parliamentary sovereignty with a parliamentary executive is not essential. In fact, British Parliament itself has been a sovereign Parliament for centuries, but the country was governed by a non-parliamentary executive, until the time when Robert Walpole established the convention of mass responsibility of the Cabinet to Parliament.¹ Another instance is afforded by the pre-war German Empire. The legislature was a sovereign body in the sense that it could change the constitution of the country, and still the Emperor or his Ministers could not be appointed or dismissed by Parliament.

237. Who appoints them: (3) As is already stated, the British Cabinet in theory is a non-parliamentary executive. In reality, however, it is a parliamentary executive as the King's choice is limited to the party that is in Parliament. The man selected by the King to act as Prime-Minister must be the recognized leader of this majority party. The other Ministers are appointed by the King in name; in reality they are chosen by the Prime Ministers from his own party. If we look deeper into the matter, at bottom it is the electors, who really appoint the executive, and also to a certain extent dismiss it. The result of a general election in effect is the choice made by the electors, as to which party shall govern the country and as to who shall be the Prime-Minister. A time might come when the Premier might be elected by a popular vote, as is the President in the United States of America.

238. (4) The Merits and demerits of a Parliamentary Executive may also be considered. (a) As it depends upon the pleasure of Parliament and support of the majority, it hardly ever thinks of coming into conflict with that body. This want of friction saves the country from many evils which such conflicts necessarily carry in their wake. The wheels of government run smoothly and political disturbances are easily avoided. This merit is also its defect from another viewpoint (b) A parliamentary executive must necessarily be weak. It has always to keep its finger on the pulse of the majority in Parliament and on that of the electors outside. It cannot afford to run counter to their wishes. Not only that, it must always be amenable to the wishes and even the fancies of its masters. In matters of administration and legislation the transient passions and fancies of a parliamentary majority and the electors are often likely to be reflected. Such an executive therefore tends to be a mere creature of its creator.

239. (5) The merits and demerits of a non-parliamentary Executive are the exact opposite of those of a parliamentary executive. Where the one is weak, the other is strong and *vice versa*. (a) The comparative independence of a non-parliamentary executive makes it a strong body. No doubt, under a representative government, such an executive would always try to be on good

* 1, See chapter II,

terms with the legislature, but that does not mean that men of strong will would long remain amenable to the wishes of the legislature, especially where they feel that these wishes are an outcome of transient passions and fancies and are in fact against the best interests of the country. On such occasions a strong-willed and independent executive can confer a great boon on the country by running counter to the wishes of the legislature. (b) This merit, however, causes friction between the executive and the legislature and leads either to bloodshed or impedes the conduct of public affairs. France supplies more than one instance of this demerit of a non-parliamentary executive.

240. Solution: Swiss executive: (6) Is it possible to form an executive which combines the merits and at the same time avoids the demerits of both these systems? It is suggested that to achieve this object the executive may be appointed or elected by the legislature but the latter should not have the power to dismiss it. The Swiss people seem to have solved this problem. Their Federal Council is elected by the Assembly, for three years, but is not dismissable by that body. The executive thus possesses a permanence and stability which generally does not characterise a parliamentary executive. And strange to say, it does not come into conflict with the legislature. Again, the members of the Council are eligible for re-election for a further period of three years, and as a rule they are re-elected. But then the Swiss Council is a business-like body, more in the nature of the permanent civil service in England than a Military or Cabinet. Public affairs in Switzerland are managed in the same fashion in which a board of directors manage the affairs of a joint-stock company. It may, therefore, be said that the Swiss solution of the problem is not a solution which may be of much use to other countries.

CHAPTER XI

Rule of Law in Practice (continued.)

241. Rights of Citizens: We have discussed in the last chapter certain subjects which belong apparently to the law of the constitution, but are founded at bottom upon the rules of civil and criminal law of the United Kingdom. There are certain other subjects, which though are primarily deduced from the rules of ordinary law, form a foundation of the constitutional law of the country. These subjects embody the three fundamental rights of citizens of an independent and sovereign state. They are (1) the Right to Personal Freedom; (2) the Right of Freedom of speech; and (3) the Right of Public Meeting.

1. Personal Freedom

242. What it means: The right to personal freedom means that no man may be punished, imprisoned or coerced, except for a breach of law proved

in a legal manner before an ordinary tribunal. As understood in the United Kingdom, every citizen has an inherent right not to be subjected to imprisonment, arrest or other personal coercion or violence in any manner, that cannot be justified in a Court of law. It will be *prima facie* illegal, if a man is made to suffer any physical restraint, except under two conditions only, *viz*, (i) that he has committed some offence and is to be taken before the Court to stand his trial, or (ii) that he has been already tried for some offence and sentenced to imprisonment or some other punishment for the same.

243. How it is secured: In most of the foreign countries, like France or Belgium, possessing a written constitution, this right of individuals to enjoy personal freedom is declared and guaranteed in unmistakeable language. It is laid down as a general proposition in one of the articles of the constitution. On the other hand, the personal security enjoyed by British citizens cannot be found as depending upon or originating from any general proposition contained in any written document. Some writers think that this right flows directly from the provisions of the Magna Carta, the Petition of Right and the Bill of Rights, the three great landmarks of the British constitution. The last of these enactments, no doubt, declared the Court of High Commission to be illegal and put an end for ever to the attempts of the Crown to set up Courts, where men might be tried in an uncertain and arbitrary manner. It is also true that these documents recite, "no freeman was to be arrested, imprisoned, put out of his freehold outlawed, exiled, punished, or put upon in any way except by lawful judgment of his peers or the law of the land". But these enactments are only records of the existence of such a right. It neither originated from these documents nor does it depend upon them. The right itself existed even before these documents came into existence. And, it is an outcome of the ordinary law of the land enforced by the Courts, not a special privilege, as in France, to be guaranteed and insured by something having power over that ordinary law. In the United Kingdom, this right is the basis and foundation, not the result of the constitution. The mere proclamation of the right in the constitution gives little security that it will be translated into action. On the other hand, if it is an outcome of the ordinary law of the land, there is always a guarantee that it will be duly enforced in practice, and it is secured in the United Kingdom by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law.

244. Safeguards: The chief safeguard for the liberty of the subject lies in the legal remedies which have been provided in case of its infringement. The adequate legal means for the enforcement of this principle by the Courts of law are of two kinds: (A) The remedies by criminal information and indictment or in civil action for damages are a means of obtaining redress for an injury already committed. (B) The remedy for false imprisonment or illegal detention of the citizen's person is by means of a writ of *habeas corpus*,

which in a proper case puts an end to the imprisonment or detention itself. (C) Besides these legal remedies there is also an additional right, that of self-defence, which citizens can exercise within the limits prescribed by law.

245. (A) Redress for injury committed: A person is said to get redress when he either gets the wrong-doer punished or obtains compensation from him for the damage caused to him by the wrong. (i) In the first case the remedy is by way of criminal proceedings. For instance, if A assaults B or detains him, in the legal phraseology "imprisons" him, against his will or without his connivance, B can bring an action against A in a criminal court and have him punished. Even if A is an officer of the Government, such an action will lie against him in an ordinary Court of law in England and B will not be obliged to go to an administrative Court for redress, as in France. In giving such redress the Courts adhere to two fundamental maxims of the constitution. In the *first* place every man is himself personally liable for every unlawful or wrongful act in which he takes part. This means that such a man cannot plead in his defence that he did the act under the orders of his master or superior officer. So a servant of the Crown and a servant of a private citizen are like responsible for their wrongful acts. This doctrine, as we have seen, is the great constitutional doctrine of ministerial responsibility and has helped much to curb the arbitrariness of the Crown. Even the orders of the King, therefore, will not justify A in his wrongful or illegal act. *Secondly*, the Courts will remedy the infringement of a right, whether the injury be great or small and trifling. Even the most trifling injuries will be remedied by them. The law of England protects the citizens against every kind of infringement and given the same kind of redress, only differing in degree, for the pettiest as for the gravest invasions on personal liberty. And, all offences, great and small, are dealt with on the same principles and by the same Courts. That law knows nothing of special offences or special tribunals. (ii) In the illustration given above B can take a civil action also, if he so chooses, and file a suit for damages in a civil Court. If he can convince a jury that this personal freedom was seriously interfered with by the wrongful act of A, he can obtain damages in money from his assailant. The measure of such damages will certainly depend upon what the jury think that B deserves.

246. (B) Remedy for recovering liberty: The above-mentioned methods of redress will not be of much use to B, however, unless he can first become free from restraint, to enable him to proceed against A, civilly or criminally. If A keeps him imprisoned, B cannot console himself by thinking that he will get him punished or obtain damages from him, on being free. The first necessity therefore is to provide a method by which he can recover his liberty. The mere fact that B can put his oppressor on trial before a Court of law afterwards, affords the most insufficient security for personal freedom.

His liberty cannot be properly secured unless the law provides for him a means to get free from wrongful confinement. The writ of *habeas corpus* provides such security. (i) *Writ of Habeas Corpus*: This writ provides adequate security that every one who, without legal justification, is placed in confinement shall be able to get free. It is an order issuing from the Court of King's Bench, upon affidavit either of the prisoner himself or some other person, showing probable grounds for supposing that a case of false imprisonment exists. There are various forms of the writ, one or the other of them being issued according to the various purposes for which it is desired to have the person so confined brought up before the Court. (a) *Habeas Corpus ad subjiciendum* is the great constitutional remedy for testing the legality of a commitment or any other form of forcible detention of the person. This is the most frequently used form of the writ. (b) *Habeas Corpus ad testificandum* is used for bringing up prisoners to give evidence. (c) *Habeas Corpus ad respondendum* is used for bringing up prisoners to be tried upon some fresh charge. (d) *Habeas Corpus ad deliberandum* and *recipias* is used for removing prisoners from one custody to another for trial. (e) *Habeas Corpus simple* is used for bringing a prisoner from the King's prison into Court to be charged with a writ of attachment. (ii) *Nature of the writ*: The writ, as is already stated is in the form of an order from the Court of the King's Bench addressed to a person by whom a prisoner is alleged to have been kept in confinement to produce such prisoner before the Court, to let the Court know on what ground he is so confined and to give opportunity to the Court to deal with him as the law may require. The words "*Habeas Corpus*" mean to "have his body." So the prisoner's body is to be produced before the Court. The essence of the whole transaction is that the Court may obtain knowledge of the reason of his confinement and it may either set him free immediately if the cause of his detention is insufficient, or see that he is brought to trial speedily, if he is alleged to have committed any offence, punishable by the penal law of the country. He will be released on bail in cases of misdemeanour and if not admitted to bail, in cases of treason or felony, he will be kept in custody, but is entitled to be tried at the next Sessions, unless the delay is occasioned by the inability of prosecution witnesses to attend. Such a writ can be issued by the Court on the application of the prisoner himself, if he is in a position to do so, or by some person on his behalf. The Court always grants it as a matter of right on being satisfied by affidavit that *prima facie* there is reason to believe that a person is wrongfully deprived of his liberty. And, the writ can be addressed to any person whether an official or a private citizen in whose custody the prisoner is supposed to be. Any disobedience to the writ will expose the wrong-doer to summary punishment for contempt of Court and also to heavy damages, recoverable by the party aggrieved. (iii) *Habeas Corpus Acts*: The right to get such a writ issued is founded on the

common law and existed long prior to 1679, when the first Habeas Corpus Act¹ was passed. This Act applied to persons imprisoned on a charge of crime. Another Act² was passed in 1816 and applies to persons imprisoned otherwise than on a charge of crime. These Acts are now treated as the foundation of a British citizen's right to enjoy personal freedom, despite the fact that the right existed at common law, before the said Acts were passed by Parliament. The reason is that the Common law right to get the writ issued was often evaded under various pleas and excuses. The Acts are designed to frustrate all such devices at evasion, either on the part of the judge or of the person in whose custody the prisoner is supposed to be.

247. (1) Act of 1679: If a person is imprisoned on a charge of crime without any legal warrant, he has a right to be set free under the first Act. If he is detained under a legal warrant, then if his offence is a light one, he has a right to his liberty on giving proper bail to ensure his appearance at the time of trial. If on the other hand, he is accused of a serious crime, like felony or treason he cannot be admitted to bail and set free, but he has the right to be brought to a speedy trial. The effect of the writ would be evaded if the Court fails to examine into the validity of the warrant and to either set him free or bring him to speedy trial. The Act provides against these possible failures of justice. The jailor is bound to produce the prisoner before the Court with the cause of commitment on receipt of the writ, as directed therein. If the cause is insufficient the prisoner is set free at once. If accused of a minor offence, he can insist upon being admitted to bail; and if accused of felony or treason, he can insist upon being tried at the next Sessions. If he is not tried even at the second, he can insist upon being released without bail. Thus a person, even on a charge of crime, cannot be kept in prison for a long time under any circumstances, except when he is duly tried and found guilty for the same.

248. (2) Act of 1816: The second Act deals with persons detained in confinement otherwise than on a charge of crime. The machinery for obtaining the writ in case of such persons, was imperfect before this Act came into force. It applies equally to Englishmen and foreigners. The writ of *habeas corpus* under this Act affords means for his protection. If he is wrongfully confined, the Court will at once release him, on his person being produced before it, in obedience to writ. Under this Act any person can regain his liberty. On showing *prima facie* good grounds, the Court will issue a writ to anyone who has the aggrieved person in his custody, to have him brought before the Court and to set him free if found suffering restraint without lawful causes. So long as there is a single individual willing to exert himself on behalf of the victim, there is always the certainty, under this Act, of getting his case investigated and of recovering his freedom, if found wronged.

1. 31 Car. II, ch. 2. 2. 56 Geo. III ch. 100.

249. Remedies more important: The history of these Acts brings into prominence the fundamental difference between the British polity and foreign polities. These Acts strongly illustrate the predominant attention paid by the British polity to remedies to make the legal rights real and effective and to get satisfied by mere declaration of such rights in the constitution. They are essentially procedure Acts aiming at the improvement of the legal mechanism to enforce acknowledged right to personal liberty and are mainly intended to meet actual and experienced difficulties. It is more difficult to secure the enforcement of a right than to merely declare it. These Acts have done for the liberty of British citizens more than could have been achieved by a thousand declarations of the right to personal liberty. They also illustrate that the British constitution is at bottom a judge-made law.

250. Effect of the Act: The Acts also bring out prominently the effect produced on the power of the judiciary and the executive, and illustrate the relation in which they stand to each other under the British constitution. The authority to enforce obedience to a writ gives the judges power to release a person, who is, in their opinion, unlawfully deprived of his liberty. Thus in effect, they are invested with the authority to hamper or supervise the administrative actions of the executive and of putting their veto on them, if such actions are not authorised by law. This power is often exercised and the knowledge of its existence helps to keep the executive within prescribed bounds and regulate their actions. As this power is exercised by the Courts in accordance with the strict rules of law, it cuts down the discretionary and arbitrary powers of the executive. It often prevents them from taking precautionary measures, because the English Judges do not recognize any administrative reason, as is done in some foreign countries. All that a Judge can inquire into is whether any rule of common law or statute law authorises a particular act. This power has prevented in England, the development of what is known as "administrative law" in the Continental countries. The political struggle of the 17th century mainly ranged round the position of the judiciary, because the Parliament saw clearly that the working of the fundamental principles of the constitution depends solely on the degree of authority and independence conceded to the Courts of Law, and also that it was a royal road to obtain sovereignty for Parliament.

251. The Suspension Acts: This power of the judiciary to issue a writ and thereby compel either the release or the speedy trial of persons charged with crimes, has been found an inconvenient and sometimes a dangerous restriction on the power of the executive, and especially so in times of political stress. To remedy this a method has been devised to suspend to a certain extent and for a particular period of time the power of the Court, under the *Habeas Corpus* Acts. This is done by passing annual Acts, popularly known as *Habeas Corpus* Suspension Acts. Under these Acts a person im-

prisoned under a warrant of the Secretary of State on charge or suspicion of high treason only cannot insist upon his release or speedy trial. Thus the power of the Court is taken away while such an Act is in force, but only so far as the high treason cases are concerned. There is nothing like a general suspension of the right to the writ of *habeas corpus*. Besides, being an annual Act, it must be renewed by Parliament every year, if it is to continue in force. This gives Parliament power to supervise the acts of the Ministry during the period of suspension. Thus the executive gets a power to defer trial of persons imprisoned on the charge of treason. But this power is a mere trifle in comparison to the power conferred upon executives in some foreign countries by what is known as 'suspending the constitutional guarantees.' It cannot in fact prevent the Court from issuing a writ in the case of a person charged with a crime other than high treason. Besides, while called upon to renew it, the Parliament would not do so, if the necessary circumstances have disappeared.

252. Acts of Indemnity: The Habeas Corpus Suspension Acts have to be supplemented by Acts of Indemnity. Under ordinary circumstances, when the period of the Suspension Acts is over, the aggrieved person or his friends can move the Court for redress. The Court, in case where the person is unlawfully detained, will not only release him, but will also award him compensation, to be paid by the authority, who detained him unlawfully. Thus the executive will be liable to actions for their illegal conduct as soon as the term of the Suspension Acts expired. That such an Act was in force, when the alleged illegal act was committed by them, will afford no defence whatever. Besides, during the time such suspected person is detained in prison, a good number of other unlawful acts will have been committed by the agents of the executive and they all will be liable for these acts. To avert this situation an Act of Indemnity is passed by Parliament. It is a retrospective Statute freeing persons, who have broken law, from responsibility, for its breach. The effect of this Act is to make lawful, acts which when committed were unlawful. It affords a supreme instance of the exercise of Parliamentary sovereignty inasmuch as it legalises illegality.

253. How the supremacy of law remains unimpaired: Although the Suspension Acts, coupled with the Acts of Indemnity enable the executive to do acts, which though politically expedient, are not strictly legal and arm them with arbitrary powers, it must be supposed that the supremacy of law is destroyed in any way. The Suspension Acts are passed by Parliament only when it is convinced that a crisis has arisen when rights of individuals must be postponed to considerations of state. These Acts become ordinary laws of the land and whatever illegal acts are committed by the executive are committed under their authority. The object of these Acts is to allow free exertion to the discretionary power of the executive for public good

and they will certainly fail in their object, unless the executive is assured that their *bona-fide* acts will not be questioned, at some future date, by the Courts. The expectation that an Act of Indemnity will be passed, protecting them, gives this assurance. Here again, the supremacy of law is evident. The Act of Indemnity which protects them is passed by Parliament and becomes an ordinary law of the realm. Although it is a legalisation of illegality, it is also itself a law.

254. Uncertain assurance keeps the executive in check : It must also be noted that the assurance given by an Act of Indemnity is prospective and uncertain. In the first instance, when Parliament is called upon to pass Suspension Acts, it wants to be convinced that political expediency necessitates such a course. Again, when it is called upon to pass an Act of Indemnity, it sits on judgment on the acts of the executive committed under the authority of the Suspension Act. If it finds that the power conferred upon the executive has been misused or abused, it can refuse to pass an Act of Indemnity and leave the executive exposed to the rule of law and to the mercy of the law-courts. Besides, even an Act of Indemnity will not protect an official, who has acted *mala fide* and was influenced by malice or corrupt motives. Thus these two kinds of Acts bring into prominent relief the Sovereignty of Parliament and the supremacy of Law, the two principal characteristics of the English constitution.

255. (C) The Right of Self-defence : If a citizen is subjected to unlawful restraint or violence, *e. g.*, if another person tries to detain him unlawfully or assaults him without any justification in law, the citizen so treated has a right in law to repel such restraint or violence by force. This right is known as the right of self-defence. This right is necessarily circumscribed by various limitations, inasmuch as it involves taking the law into one's own hands. The law, in putting limitations on the right of self-defence, tries to effect a compromise. On the one hand, the right is to be maintained to allow every citizen to repel the wrongdoer; on the other hand, it is also necessary to see that private warfare is not encouraged hereby. The law tries to effect a compromise between these two necessities, that of allowing the citizen to maintain his personal liberty against the wrongdoer and that of suppressing private squabbles. If the right of self-help is denied the loyal citizens tend to be slaves of ruffians; if it is over-stimulated the jurisdiction of the Court is substituted by that of recourse to arms, which involves a great danger to public peace. It is accepted on all hands that there is no right of attacking another person for injuries past or impending, for, in such cases, one must have recourse to proper tribunals for redress. Again, a popular but erroneous notion exists that a citizen can lawfully use any amount of force which is necessary, and not more than necessary, for the protection of his legal right. It must be borne in mind that

it is not every right that may be lawfully defended by the force necessary for its assertion. For instance, if A trespasses on the ground of B, B has no right to shoot at A to prevent him from doing so. Two theories, of course, meaning at bottom the same thing, are current regarding the legitimate use of force necessary for the protection or assertion of a man's right. We may examine these theories.

256. (i) Necessary and reasonable Force : The first theory is that a man may lawfully use any amount of force which is both "necessary" and "reasonable" or "proportionate" to the injury intended to prevent. He cannot use in defending his liberty, person or property, an amount of force which is either unnecessary or unreasonable. The word "necessary" means "not more than enough to attain its object." And the words "reasonable" or "proportionate" mean "the force that does not inflict upon the wrongdoer mischief out of proportion to the injury or which the force used intended to prevent." This theory is known as the doctrine of legitimacy of necessary and reasonable force. The force used can be considered necessary only if the mischief sought to be prevented could not be prevented by less violent means, and, if the mischief done by, or which might reasonably be anticipated from the force used is not disproportionate to the injury or mischief which it is intended to prevent. The force so used must be needful for the protection of rights and must not inflict damage out of all proportion to the injury to be averted or to the value of the right to be protected.

257. (ii) Force necessary for self-defence : The second theory is that in repelling an unlawful attack upon his person or liberty, a man is justified in using against his assailant so much force, even amounting to the infliction of death, as is necessary for repelling the attack. The infliction of death must be justified by the necessities of self-defence. This theory is known as the doctrine of legitimacy of force for self defence, i.e., defence of life, limb or permanent liberty. It produces the same practical result as the first theory. It means that before a man can use force to protect his life, limb or liberty, he must do everything in his power to avoid the use of extreme force. If A threatens to attack B, B can avoid danger to himself by retreating as far as he can. If however B is driven to the wall and there is no room for further retreat, he may lawfully repel A by force. Let us take another instance. A is walking on a footpath which runs through a ground which B claims as his own. B asks A not to use the footpath. If A considers this an invasion of his right he can push B by and walk through. Supposing, on being so pushed B runs at A with a knife in his hand A is then entitled to repel him by using such force as might cause bodily injury to or death of B. But if before A came to the footpath, he had reason to believe that B would rush at him with a knife, if thwarted, he must avoid going there even if it necessitated, to take a longer route to reach his destina-

tion. Under these circumstances, A has no right to inflict bodily injury on B to establish his legal right of passage. A can then have redress against B in a court of law, if he can establish his right to walk through the grounds.

258 (iii) Use of force for the advancement of public justice: Besides this legal view of the right of self-defence, there exists an inherent right in every citizen to use force for the advancement of public justice. It is not only a right but a duty also. For instance, there is a disturbance and a breach of the peace takes place, A loyal citizen who is present at the time is bound to put an end to the same and use as much force as is necessary for the purpose. If some violent crime is committed in his presence, he is bound to arrest the criminal. If he remains negligent and allows the offender to escape he will be liable to imprisonment himself. It is his duty to use his best endeavours to prevent his escape. Supposing a person attempts to rob or murder another person or to break open a house at night, he can be lawfully assaulted and arrested either by the person against whom the crime is intended or his servant or any other person, who is present. If the criminal tries to escape, his escape may be prevented by knocking him down, if there is no other means to prevent the same. If the man dies from the blow, the man striking it shall be acquitted and discharged. It will only be a justifiable homicide, the blow having been given in discharge of his public duty.

2. Freedom of Speech

259. The Law of Libel: The right of an individual citizen to freedom of speech is secured in France and Belgium, like the right to personal freedom, by declarations to that effect in the Constitution. It is known by various names, such as, the right to free expression of opinion, or freedom of discussion or the liberty of the press. These rights, especially the last named, are embodied in France and Belgium in the Articles of the Constitution. Although the ideas are borrowed by the statement of these countries from the United Kingdom, these phrases can rarely be found in any statute or rule of common law. They are not the fundamental doctrines of the law of England in the same sense in which they form part of the fundamental law of France and Belgium. In fact, this right is deduced from the ordinary penal law of the land, viz., the law of libel. Any person can say or write anything and about anybody, subject to the restriction only that he will expose himself to the risk of punishment if he publishes anything which he is not legally entitled to publish. In plain terms, it means that a person has no right either to defame another or to spread sedition or blasphemy. There is no press-law in England recognising in general any special privilege of the press. The law which applies to it is the ordinary law of libel. The British law in general establishes that no one can be punished except for a breach of law. The principle applies in this case also, and no man can be punished for any statement unless the same is proved

be a breach of law, in a legal manner, before a Court of Law. Unless the liberty given to the individual by law, to say anything he likes, is misused, the law does not intervene. In case, it is proved to have been misused, the person defamed can get damages, or if the statement is against the Government or morality, he may be fined or imprisoned, as the circumstances require.

260. Restrictions on the Right: (1) *As regards individuals:* The English law of libel places several restrictions on the right of individuals to make statements regarding other individuals. There are many statements which no man is entitled to make in public regarding another man. It will be a libel to publish an untrue statement which is calculated to injure the interests, character or reputation of another person. And, all those who "publish" such statements will be held individually liable in law. The gist of the offence is "publishing" or making known such a statement. Hence, not only the person who makes the statement and authorises its publication but also the publisher who publishes it for sale or distribution, the printer who prints it, and the man who sells or distributes it will all be individually liable to be sued for defamation and damages. For instance, if A writes an untrue statement regarding B, which is calculated to injure his interests, character or reputation, C authorises its publication in his newspaper, D prints the newspaper and E sells the said newspaper containing the statement, then B can sue them all individually for damages on the charge of defaming him. This separate liability of individuals concerned in a breach of law is the most notable characteristic of English Law. No amount of good intentions or honest belief will avail the wrongdoers as a legal defence for his act, if the statement is, in fact, false. Again they are equally liable even if they reasonably believed the statement to be true at the time they published it. It is sometimes believed that fair criticism is not libellous. This may be so, but only so far as the critic keeps himself within lawful bounds. He cannot make his criticism a veil for personal attack and the line between fair criticism and personal attack must be carefully drawn by him. That delicate question is to be determined by a jury and a little transgression may involve the critic into heavy damages. It must also be borne in mind that mere *truth* of a statement is not of itself a sufficient defence to protect the person from the consequences of his liability. Besides, being true, the statement must have been in *public interest*. A person will be criminally liable for publishing a statement, which though true, injures an individual without causing any benefit to the public, thereby. (2) *As regards Government:* The law of libel also restricts the right of individuals to make statements as regards the conduct of the Government in the administration of public affairs. If a person published any statement which is calculated to bring the Government established by law into hatred or contempt or to cause disaffection against the same he is guilty of sedition. The same principle applies if the statements so made are calculated to bring into hatred or contempt or cause disaffection,

against the King, the constitution, either House of Parliament or the administration of justice. If the statements are published in a written or printed document, the publisher is guilty of seditious libel. It will also be seditious to excite the citizens of the United Kingdom to attempt the alteration of any matter in Church or State, by any means other than lawful or to cause ill-feeling and enmity between different classes and communities of the realm. No doubt, every citizen has a right to criticise in *bona fide* manner the conduct of public affairs, with the laudable intention of showing its defects and bringing about reform of existing institutions by legal methods. The law does sanction such criticism, but as in the case of individuals, so in this case also, the line of demarcation between *bona fide* criticism and statements calculated to be seditious must be carefully marked and must not be transgressed. The question as to what is a *bona fide* criticism and what is a seditious statement will also depend upon the mind of the jury. (3) *As regards religious or moral opinions:* The law is generally the same as regards freedom of discussion on religious or moral topics. Besides being defamatory, statements may also be either blasphemous or obscene or both. If such statements are written and published or spoken in the hearing of others, they constitute a misdemeanour at common law punishable by fine or imprisonment on indictment or criminal information before the Courts. It may surprise us to know that the old law of *blasphemy* still exists in the United Kingdom. It means the speaking or writing and publishing of profane words vilifying God, Jesus Christ, the Holy Ghost, the Old and New Testaments, the Book of Common Prayer or Christianity in general, with intent to shock and insult believers or prevent or mislead the ignorant and unwary. If such statements are intended to wound the feelings of others or to excite contempt against the Church by law established, the wrongdoer will be punished for the same. It is considered doubtful whether such statements, if they are intended, in good faith to propagate opinions which the person who publishes them regards as true, will be exempted from the character of blasphemy. This much is, however, established that it is no longer blasphemy nor contrary to the policy of law, soberly and reverently to examine and question the truth of Christian doctrines.¹ Similarly, obscene statements calculated to deprave and corrupt or promote immorality in those whose minds are open to such immoral influences, constitute an offence entailing penalties imposed by law.

261. Amount of freedom varies : When we take into consideration these restrictions placed on the right to freedom of discussion by the common law and statute law of the United Kingdom, we are led to suppose that the right in question does not exist in that country, in the form in which it exists in France or Belgium, by virtue of a definite and specific declaration in the constitution. Much, however, depends in the United Kingdom upon the fact as to how and by whom the law is to be applied in practice. In substance, as

1. *Shore v. Wilson* (1842) 11 Cl. & F. 355; *Reg. v. Ramsay & Foote* (1883) 48 L. T. 743; *Bowman v. Secular Society* (1917) A.C. 408.

s already seen, the determination of the question whether a particular statement is or is not a libel depends upon the decision of a jury. The questions of truth, fairness and intention, which affect the legal character of a statement in question are determined by them and whether the man publishing the same is to be convicted and punished depends upon their judgement. Thus in effect the right to freedom of discussion in the United Kingdom depends upon what twelve shopkeepers think it necessary should be spoken or written. Hence, the amount of freedom naturally varies at different times and in different circumstances, which necessarily influences the minds of these twelve gentlemen of the jury. Much will, therefore, certainly depend upon the trend of popular sentiment prevalent at the time when and the circumstances under which the statements are published. One thing, however, must be specially noted. Where the Judge is satisfied that the publication cannot be a libel in law, he is justified in withdrawing the same from the cognizance of the jury. Again, no special privileges are accorded to the 'press' or to periodical literature, as is understood by that word in common parlance in this respect. The statements written and published by persons connected with the press in newspapers and other periodicals stand on the same footing as the statements spoken or published in any other form by other persons. We might even say therefore, and without fear of exaggeration, that the liberty of the press is not recognized in the United Kingdom by the law of the land.

262. Liberty of the Press : (1) *History:* This was not always the case. At one time, in the sixteenth century, the Crown claimed the monopoly of all presses by virtue of his prerogative. No one could print except by special license. The exclusive right of printing and publishing was then held by ninety-seven stationers who formed themselves into a company, with power to seize all publications by persons not belonging to their guild. Besides this restriction, the Court of Star Chamber claimed the regulation of all press matters and press offences were tried by it without a jury, and heavy penalties inflicted. A regular system of censorship was established by that Court and no book or document could be published unless read over and licensed by various authorities. The restriction as to the number of presses eventually broke down, but the system of licensing of books before publication was made more stringent by the Licensing Act, 1682¹. The system continued upto 1693, when the Act expired. An attempt was made to renew it in 1695 but it failed and since then the liberty of the press has come to depend upon the law of libel. (2) *No previous license:* Despite the restrictions on the freedom of discussion, however, the press in England is free and notably so, because there are neither special restrictions placed nor special privileges showered upon it by any special enactment. It is subject to ordinary law of the land and illustrates very strongly the supremacy of law prevalent in all

1. 13 and 14 Car. 11, ch. 33.

English institutions. The press can print anything now without a previous license, subject of course to the consequence of law. If the publication is illegal, the publisher is exposed to its penal consequences. There is in fact a mere application of the general principle that no man is punishable except for a distinct breach of law. Any idea of license or censorship will be repugnant to this principle. Even the Courts cannot restrain the circulation of a libel, except temporarily in rare cases, unless the publisher is convicted by a jury of twelve of his countrymen. With the single exception of the licensing of plays, no such thing as a license or censorship of the press is known in England, because the pervading principle of English law is that men may be interfered with or punished, not because they may or will break the law, but only when they have committed some definite and assignable legal breach. If we analyse the situation properly, it becomes evident that the press is free because it is subject to the ordinary law of the land and nothing else. The writer and sender of a private letter and the writer in the press or publisher of a newspaper stand in the same position legally. (3) *Trial by ordinary Court:* The offences connected with press are tried and punished by the ordinary Courts. This may not seem to be very important at first sight, but it has helped considerably to establish the liberty of the press on firm foundations, and to curtail the power of the executive. Generally speaking, the executive will desire to check the excesses of public writers in times when the public sentiment is against it. But the twelve jurymen forming a part of the public and sharing the same sentiment will look at the publication in question not from the view-point of the executive, but from that of the public, and will sympathise with the writer whom the government wishes to punish. Hence, it is an even chance that they will hold such censures as fair and praiseworthy criticism of official errors. Thus it is that the trial by jury which is in fact the universal predominance of the law of the land has ensured practical freedom of the press in England. A press in offence in England is nothing else but an offence under the ordinary law—in this case the law of libel—of the land and is to be tried in the same way as laid down for the trial of other offences.

263. Press Law in France: In France, the position of the press is the exact opposite of that in England. In England, as we have already noticed the press is left alone; no special legislation appears to have been needed for either securing its freedom or curtailing its rights and press-offences are on the same level as other offences. In France, the press-law forms a special branch of legislation and press offences form a special class of crimes. This is due to the fact that opposite doctrines prevail in these two countries concerning the relation of the State to expression of opinion in print. The doctrine in England is that the State has nothing to do with the guidance of public opinion, its duty is only to punish libels, whether in writing or in print. Hence, the press-law in England is nothing else than the application of the law of libel. On the

ther hand, the prevailing doctrine in France is that it is the duty of the State not only to punish libel but also to guide and control the expression of opinion, so as to prevent propagation of dangerous doctrines. Following up this doctrine in practice, the legislature made it a monopoly to print and sell books and severe penalties were imposed upon those who published books without a license. The newspaper did not practically exist till the Revolution. After the Revolution restrictions upon the press were removed in theory and the right of every individual to publish his opinions was recognised by the constitution. This declaration and guarantee became worthless in practice, because of the doctrine mentioned above. The State continuously attempted to stifle expression of public opinion by various devices. Press-offences have continued to be special offences and are not given the benefit of a jury. The result is that while in England the press has become completely free from State control without any pious declaration of the right in the constitution, the press in France is still shackled despite such solemn declarations.

264. How this liberty was secured: Let us see for a moment how this liberty of the press was secured in England. The position of the press was the same, as in France, as we have seen, during the 16th and the 17th centuries. Special license was required to exercise the printing trade and press-offences constituted a special class of crimes. The censorship survived till the year 1695. The Parliament refused in 1695 to renew the Licensing Act not because they entertained any notions concerning the right of every individual to freedom of thought and opinion, but because the Act caused many petty grievances distasteful to the public. And once abolished, it was never revived in England. On the other hand, despite the solemn declaration of the right to free expression of thought, the system of censorship was abolished and revived several times in France. The question occurs how is it that in both these countries, the principles governing the press-law continued to be the same upto the beginning of the 18th century and are so essentially different now? The explanation is afforded by the supremacy of law which distinguishes the English constitution. Before the 18th century, the circumstances in both the countries were similar and produced naturally the same result. The same administrative ideas regarding relation of the State to individuals prevailed and the public opinion required the executive to treat the control of literature as an affair of the State. These notions are traditional in France. The doctrine, that the State has superior rights and powers as against individuals, has always prevailed there and the subsequent course taken by the State after the beginning of the 18th century in connection with the press is entirely in keeping with that traditional idea. The system of censorship has continued there because the doctrine of general reverence for the authority of the State has also continued. The exercise of that authority harmonise with the general spirit of the French Law with regard to the press. The administrative machinery

created by that spirit places at the disposal of the executive adequate means for enforcing that discretionary authority.

265. Spirit of legalism—the only cause: In England on the other hand, the notions prevailing in the 16th and 17th centuries were dictated by the needs of the age, but were, in fact, at bottom repugnant to the traditions of the people. The Englishmen are traditionally against the use of arbitrary power and always desire to be ruled by the law of the land. Although they hardly ever cared for the liberty of the press, they refused to renew the Licensing Act, because it gave arbitrary power to executive. That Act was abolished not because the Parliament wished to secure the right to freedom of discussion, but because the Act was not in keeping with the general tendency of law as it sanctioned exercise of discretionary power by the executive. Such a sanction would not be in harmony with the English conceptions of the rule of law.

266. Exceptions: A few exceptions must be noted here. For ordinary publications no special enactment exists and no previous license is required. There are however certain special kinds of publications which are regulated by special Acts of Parliament. (1) The Theatres Regulation Act, 1843¹ empowers the Lord Chamberlain to forbid the acting or representing of any play or part of a play, for the preservation of good manners, decorum and public peace. The same Act requires all theatres to be licensed. (2) Lord Campbell's Act, 1857², empowers the Magistrates to seize all the stock at the publishers' and the booksellers' and prevent the further issue of any copies of books proved to be obscene. (3) The Court of Chancery and the House of Lords exercise jurisdiction over intended publications of libels amounting to contempt of Court or of statements calculated to be defamatory. (4) The Newspapers, Printers, and Reading Room Repeal Act, 1889³ requires that every paper or book intended to be published must bear upon it the name and address of the printer. (5) The Newspaper Libel and Registration Act, 1881⁴ requires that all newspaper proprietors must register their names at Somerset House, with the object of enabling persons libelled to ascertain who is responsible.

3. Public Meeting

267. Result of Liberty of Person and of Speech: The right of individual citizens to assemble in a public meeting is also deduced from the ordinary law of the land, in the United Kingdom. While the constitutions of other countries declare and secure the right of public meeting as one of the fundamental rights of citizens, by embodying it in an article of their constitution, the British law does not recognise any such specific right, either for a political or for any other purpose directly. That right in England is nothing

1. 6 and 7 Vict., ch. 68; 2. 20 and 21 Vict., ch. 83; 3. 32 and 33 Vict., ch. 24.

4. 44 and 45 Vict., ch. 80.

more than the natural result of the view taken by the British Courts of the two rights of individuals discussed by us above, *viz.*, of individual liberty of person and of individual liberty of speech. There is no special law in the United Kingdom securing this right to the people. It only results from the application of the ordinary law of the land by the Courts.

268. Application of the two rights: As seen already, in England, every citizen is at liberty to go wherever he likes and to speak whatever he pleases. That means he has full liberty of person and of speech. Now if a number of citizens go to the same place and discuss there whatever topic they choose, the same rights are exercised by each of them. The only limitations on these rights are that each individual citizen must go for a lawful purpose and act in a lawful manner. From these circumstances results what is known as the *right of public meeting*. Like that in some foreign countries, it is not a special privilege regulated by special and careful restrictions. It may be that in exercising these rights, the individuals forming the meeting, come to break the law. Each one of them will be individually liable if he goes to the meeting, either with an intent to commit a crime or break the peace. In that case, the meetings will be an unlawful assembly and can be broken up by force. Both, the purpose for which the individuals meet and the manner in which they conduct themselves, must be lawful. If otherwise, they will expose themselves to all the consequences of the ordinary penal law of the land.

269. Right to meet in public places: Although no such right is known to the law of the United Kingdom, the citizens in that country meet together for political as well as for other purposes in open places, like parks and commons, which are accessible to the whole world or in public halls, where also the public can go unless the admission is restricted and in that case the assembly meeting there cannot be called a public meeting, in the strict sense of the term. These public meetings be either for amusement or for serious discussions on public and other affairs. Even certain spaces may come to be recognised by custom as dedicated to the public to be available for holiday public meeting. The Courts however, do not recognize any such spaces as set aside for that end. In this respect a thousand people stand on the same footing as an individual. Each one of them must have a right to be there as an individual. He must not invade the rights of private property, and must not interfere with convenience of the public. In short, he must neither commit a *trespass* nor create a *nuisance*. It, therefore, need not be assumed that all open spaces are available lawfully for the holding of a meeting. The claim of such persons to remain assembled in a place to the detriment of others having equal rights is in nature ir-reconcilable with the right of free access of the public.

270. An Unlawful Assembly: The expression "unlawful assembly" signifies meeting of persons who either intend to commit or do commit or who

lead others to entertain a reasonable fear that the meeting will commit a breach of the peace. It is not every meeting of which the purpose is unlawful, that constitutes an unlawful assembly. If five or more ruffians meet together to work out a scheme of robbery or murder, they can hardly be said to constitute an unlawful assembly. *The breach of the peace* is the essential characteristic to declare the meeting an unlawful assembly. (i) A meeting, therefore, which either disturbs the peace, or inspires reasonable person in the neighbourhood with a fear that it will cause a breach of the peace, come in this category. This requires that all the attendant circumstances, such as, the state of public feeling, the class of persons, the mode in which they meet and the like, must be considered to determine the character of meeting. (ii) Again, a meeting need not be the less an unlawful assembly, because it meets for a legal object. A meeting assembled for a lawful purpose may easily be or turn into an unlawful assembly. The mere lawfulness of its object does not make it lawful. (iii) A meeting, as already stated above, assemble for an unlawful purpose is not necessarily an unlawful assembly unless the persons composing the same contemplate the use of force and inspire others with a fear that peace will be disturbed. (iv) A meeting assembled for the promotion of a purpose which is criminal and which if carried out will promote a breach of the peace is itself an unlawful assembly.

271. Guiding Principle : What is then the guiding principle? It often happens, that although the object for which a meeting is called and the manner in which the individuals composing such meeting conduct themselves are perfectly lawful, they are such as to excite their opponents to break the peace and fill the peace loving citizens with reasonable fear that peace will be broken. Such a meeting will not be an unlawful assembly merely because it is likely to excite opponents to break the peace or to act otherwise in an illegal way. A magistrate cannot lawfully forbid such a meeting or break it up, if the act is innocent in itself and is done with an innocent intent. The remedy in such a case will be to keep sufficient for present to prevent the opponents from interfering with the exercise of legal rights. The principal that probable misconduct of wrongdoers, who are determined to break the peace to prevent a meeting, does not render such a meeting unlawful if it is otherwise lawful and cannot be forbidden or broken up by the authorities, is a well-established rule in England.

272. Exceptions : There are, however, some exceptions to this rule: (1) Of course, if there is anything lawful or illegal in the conduct of persons forming a meeting and it is of such a nature as to provoke opponents to break the peace, the meeting becomes an unlawful assembly. But even if the object and conduct be strictly lawful and still of such a nature as to provoke a breach of the peace, and it becomes impossible to preserve the peace except by dispersing the meeting, the authorities can call upon the members to disperse and

if they do not, the meeting becomes an unlawful assembly. Such a course can only be dictated by the necessity of the case. If peace can be restored or preserved by any other means, the authorities are bound to adopt that course, rather than disperse the meeting. This restriction imposed upon the ordinary freedom of individuals arises from the paramount necessity of preserving the King's peace. This necessity makes it lawful for the authorities to interfere with the legal rights of an individual, if the peace cannot otherwise be preserved.

(2) Again, a meeting otherwise lawful may become unlawful, if a notice or proclamation is issued by the authorities, prohibiting the same. Such a notice or proclamation does not in any way alter the character of the meeting. It only informs the reader of the character of the meeting, which, if illegal, affects his responsibility for attending the same. However, if the meeting is lawful, it does not become unlawful because of the proclamation. The function of the State being to punish and not to prevent crimes, the executive has no power to prohibit meetings which are otherwise lawful.

(3) The third limitation is an *internal* one. A meeting may be lawful but may be of such a nature that wise or public spirited citizens would hesitate to call. It will be injudicious to call a meeting, which may provoke a breach of the peace owing to surrounding local circumstances. No wise man will ever think of exercising his legal right, if he be reasonably sure that such an exercise would be distasteful to the locality in which the meeting is called and would lead to results dangerous to public peace.

273. Right of the Crown and its servants. As is seen above, the authorities have a right to disperse an unlawful assembly by force. (i) Magistrates, policemen and all loyal citizens are not only entitled, but indeed are bound to disperse an unlawful assembly by force, and they are not bound to wait until a riot has occurred. The mode of dispersing and the extent of force which it is reasonable to use depends entirely upon the circumstances of each case. (ii) If any assembly creates a riot after meeting in a lawful manner, a magistrate on being informed is bound to declare the assembly unlawful by making a proclamation which is popularly known as "reading the Riot Act." If they do not disperse within a given time the magistrate and those acting with him may arrest the rioters or disperse them by using any amount of force necessary for the purpose. They are protected by the Riot Act from liability for hurt inflicted or death caused in dispersing the meeting. The powers given by the Act do not in any way lessen the common law right of a magistrate and indeed of every citizen, to put an end to a breach of the peace and consequently to disperse an unlawful assembly. (iii) Again, every person who takes part in an unlawful assembly is guilty of a misdemeanour, and the Crown may therefore prosecute every such person for the offence in a Court of Law. Whether any given person has really "taken part" in an unlawful assembly by

merely being present there is a question of fact in each case, to be decided before the man is convicted. If the man is unaware of the real character of the meeting he will not be held guilty and that is why proper notice is given by reading the Riot Act.

274. Use of force by members of an assembly: Let us suppose the meeting assembles for a lawful purpose in a place where the members have a right to meet, but their opponent attempt to break it up by force. What are the rights of the members of such an assembly to use force against their assailants? The same question may be asked when the assailants are the authorities, who unjustifiably declare the assembly to be unlawful. The dispersal of a meeting involves assaults on individual members. For this every individual member so assaulted has a right to take civil or criminal proceedings against his assailants, whether they be officers or private citizens. On the other hand, has such a member a right to maintain his right to take part in the meeting by using force against his assailant? He certainly has such a right in law and the same is regulated by principles which regulate the right of self-defence, discussed above. In such a case, if the assailants are private citizens moderate force may be used to repel them, but the use of firearms will not be held justifiable in law, since it will be unreasonable and out of proportion to the value of the right intended to maintain. If, however, the assailants are policemen, acting under the orders of the Commissioner of Police or the Secretary of State who has declared the assembly unlawful by a notice, the members have no right to use force to maintain the right. They can only resist passively and allow themselves to be arrested. They are not in peril of their life or limb. They have nothing to dread by temporary imprisonment and appearance before a magistrate who will deal with their rights according to law. The law does not give an individual citizen any right to resist by force policemen who with *bona fide* intention to discharge their duty, disperse an assembly which may ultimately turn out not to have been an unlawful assembly.

CHAPTER XII

The Conventions of the Constitution

275. Rules of Constitutional Morality: The term "constitutional law," as we have already learnt, includes all *rules* which define the members of the sovereign power, which regulate the relations of such members to one another and which determine the mode in which the sovereign power or the members thereof exercise their authority. We have also seen that these *rules* contain two sets of principles or maxims of a totally distinct character. One

1. 1 Geo. I, Stat. 2, Cap. 5, B. 2.

set of these rules are in the strictest sense *laws*, i.e., rules which are enforced by the Courts. So far we have devoted our attention to the discussion of these rules on the laws proper. We must now turn our attention to the other set of rules, which form a part of the constitutional law of England. These rules consist of understandings, customs, habits, maxims, practices or precepts which are known by the name of *conventions* and which are not recognised or enforced by the Court of Law. These rules of constitutional morality make up a body of constitutional or political ethics, not of laws. Our study of the constitutional law of England will not be complete unless we study also the nature of these conventions of the constitution and define or ascertain the relation between the legal and the conventional elements of the constitution. We will therefore now proceed to study the constitution of the United Kingdom from the viewpoint of its conventions

1. Nature of Conventions

276. Not less sacred than laws: The effort would be fruitless if one tried to search for these conventions in any page of either the statute or the common law. Although we cannot find these precepts of constitutional morality in any written or unwritten law of the land they are not held the less sacred in practice than the rules of law. They, in fact, form the most important unwritten part of the constitution, and the most important of them are observed and followed very strictly in practice.

277. Difference in meaning: The terms "constitutional" and "unconstitutional" are used in England in a sense entirely different from the sense in which they are employed in foreign countries possessing written constitutions. The latter countries employ the terms to mean either "legal" or "illegal". If the American Congress passes an Act which is opposed to or contravenes any of the articles of the constitution, the Supreme Court will declare it to be unconstitutional, that is, illegal and therefore void. The British Parliament being a sovereign and constituent legislature no Act passed by it can be declared illegal by the Court, in the same manner. However, the terms "constitutional" and "unconstitutional" are frequently employed in politics. For instance, if a Ministry is defeated in the House of Commons and still it does not resign office or appeal to the country, we will say that their continuance in office is unconstitutional. We do not mean thereby that it commits any illegal act by such continuance. As has been shown, in theory and in law, the Ministers are the servants of the Crown, are appointed by him and continue to be in office during his pleasure, until they are dismissed by him. In practice, they are appointed by the party in majority in the House of Commons, continue to be in office until that majority supports them in their actions and must resign as soon as that support is withdrawn. But that is a mere convention and not a rule of law, which will be enforced by the Court. By continuing in office, despite the adverse vote

in the House of Commons, they do not contravene any law of the land; they merely break the convention. This breach of convention on their part is unconstitutional. It could not be made the subject either of a prosecution in a lower Court or of impeachment in the High Court of Parliament itself.

278. A few illustrations: The conventions of the constitution are too numerous to be mentioned here. Nobody has ever attempted to reduce all of them to writing. The task, if not an impossible one, is at least a very difficult one, since new conventions grow up every day and some may go out of use and become obsolete or superfluous. Again, some of these may become embodied in an Act of Parliament and thus become rule of land and cease to be mere conventions. We will therefore study a few of the more important of these conventions here. It will be more convenient to consider them in two groups.

279. 1st group: Responsibility of the Executive: We have already mentioned one or two conventions of this group above, *viz.*, (i) "A Ministry which is outvoted in the House of Commons is in *many cases* "bound" to retire from office". The word "bound" is employed here in the moral sense and not in the legal sense. Again, the words "many cases" are significant. The Ministers are appointed by the Crown and are dismissible also by the Crown alone. They are not legally bound to resign, nor is the Crown obliged in law to dismiss them, merely because they lose the support of the majority of the House of Commons. Besides, another convention allows them to wait for some time. (ii) "A ministry when outvoted on any *vital* question, may *appeal* once to the country by means of a dissolution". The meaning of this convention is that a Cabinet is not bound even morally to resign if they are defeated in the Commons on a minor question. The question on which the majority withdraws its support must be a vital one showing thereby in unmistakable terms that the Cabinet has lost the confidence of the House. It must amount to a vote of censure to the effect that the general course of its policy does not seem to be wise or beneficial to the nation, in the opinion of a majority of the House of Commons. But even if so outvoted, they need not resign at once. They can wait for sometime and in the meanwhile advise the King to dissolve Parliament and order a general election. It does happen sometimes that the representatives of the nation in the Commons may not reflect truly the real opinion of the electors, for the time being. The Cabinet may therefore appeal to the electors and thus get a decision from them whether they should continue in office or not. If as a result of the general election, they get a majority in its favour, it continues in office. If on the other hand, the majority is still against them, the wiser course for the Cabinet is to resign and if they do not do so, the Crown may force them to resign or may dismiss them. If not, it would be impossible to carry on the Government as we shall presently see. This situation is also embodied in a convention.

(iii) "If an appeal to the electors goes against the Ministry, they are bound to retire from office, and have no right to dissolve Parliament a second time," The situation will be impossible, if they were allowed to dissolve Parliament more than once. The reason of these conventions is that according to the fundamental principle of the constitution the people or electors are the ultimate Sovereign of the State. The government of the country is to be carried on in accordance with the desire of that Sovereign. Such a Sovereign can only express its desire either through its representatives in Parliament or by voting for a particular party at the election. The executive being the servant of this Sovereign must give up office whenever the Sovereign may demand either directly or indirectly. (iv) "The Cabinet are therefore responsible to Parliament as a body for the general conduct of public affairs." This responsibility is both joint and several. (v) "Every Minister is responsible for his acts individually, done by him in the name of the Crown". Other conventions also spring up from this state of affairs. (vi) "The party, who for the time being command a majority in the House of Commons, have a right to have their leader placed in office." (vii) "The most influential of these leaders ought to be appointed the Prime-Minister". That is what happens in practice always. The Crown sends for the leader of the party that is in majority in the Commons, appoints him the Premier and entrusts to him the task of forming a new Ministry. Other members of the Ministry are selected by this leader, generally from amongst the party-his own party-that is in majority and they are appointed as Ministers by the Crown on his advice. All these are constitutional understandings referring to the position, formation and responsibility of the executive in the United Kingdom.

280. 2nd Group : Miscellaneous : There are various other conventions referring to the conduct of public affairs. (i) "The Crown ought not to make a treaty which will not command the approbation of Parliament." and (ii) "The wish of the House of Commons must be followed in foreign as in domestic affairs" These conventions refer to the prerogative of the Crown. In theory, the conduct of the foreign affairs and the power to make treaties are left in the hands of the Crown. As is already made clear, the Crown acts in all matters of public administration through its servants, that is, the Ministers. So in foreign affairs and treaty-making also the Minister acts on behalf of the Crown. In theory, Parliament cannot question their actions, but in practice the Ministers have to study the will of Parliament, that is of the House of Commons, in this respect also, being as they are individually and collectively responsible to Parliament. This situation is again negatively expressed in a separate convention (iii) "The action of the Ministry would be highly unconstitutional, if it involves the proclamation of war or making a peace, in defiance to the wishes of the Commons." By the Parliament Act of 1911, greater share of sovereign power is enjoyed by the House of Commons and

that is why the will of that House finds a prominent place in the conduct of public affairs. In fact, before the Parliament Act, 1911, was passed, the House of Commons was constitutionally more important than the House of Lords and a convention was established that (iv) "if there is a difference of opinion between the two Houses, the Upper House must give way, at some point, not definitely fixed, and if the Lords do not so yield and the Commons continue to enjoy the confidence of the electors, it is the duty of the Crown or its Ministers, to create or threaten to create new peers in sufficient numbers to allay the opposition of the Upper House and restore harmony between the two Houses." The Act in question embodies this convention to a certain extent and while obviating the necessity of creating new peers, provides for the preponderance of the House of Commons in the long run. The only power left in the hands of the House of Lords is a sort of suspensive veto, whereby they can at the most delay the passing of a measure for a period of little more than two years. One more convention be mentioned here. (v) "In case of emergency, like insurrection or invasion, the Minister must convene Parliament if they want additional authority to meet the situation and must obtain such powers for the protection of the country. In the meanwhile, they are also bound to take all necessary steps for restoring order or repelling attack, even at the peril of breaking law and must rely on Parliament to give them protection by passing an Act of Indemnity." Under such emergent and critical circumstances the Crown Acts through its servants by virtue of the prerogative but the orders of the Crown cannot absolve the Ministers from the ordinary legal consequences of their acts. This convention, therefore provides for their protection, for all acts done by them in *bona fide* exercise of their duty, in the interests of the nation.

281. Common Characteristics: These and various other rules make up the constitutional morality of England at the present day. Although they are constantly observed in practice, they are not acted upon as laws by the Courts. Almost all these rules have one common characteristic. They are rules determining the mode in which either the "prerogative" we mean the remaining discretionary powers of the Crown, whether exercised by the King himself or by his Ministers.¹ Such discretionary power is still legally left in the hands of the Crown to a certain extent, that is, power to take certain action without applying to Parliament for new statutory authority. We are not concerned here with those discretionary powers which are conceded to the Crown or its servants by Acts of Parliament. By "Privileges" we mean the discretionary authority of each House of Parliament. In short, the nature of these conventions is that they determine the mode in which the discretionary authority of one or the other members of the sovereign body is to be exercised.

1. For fuller description of the "Prerogative" see Chapter III *ante*.

282. Ultimate Aim : But the ultimate aim of these conventions is that this discretionary authority of the legally sovereign body, *i. e.*, Parliament will be exercised so as to give effect ultimately to the will of the "political" sovereign of the State, *i. e.*, the nation, strictly speaking, the majority of the electors. As seen before, Parliament is only the legal sovereign. The Political sovereign of the realm is the nation, whose will is represented by the legislature. That is the essence of representative government. The conventions aim at securing harmony between the action of the legal sovereign and the wishes of the political sovereign. They are customs or rules maintained to secure the ultimate supremacy of the nation. As the conduct of the legislature cannot wholly be governed by laws, these understandings are necessary to regulate it so as to conform it with the will of the nation. *One or two illustrations will suffice to show how this result is achieved in practice.*

283. (1) Exercise of the Prerogative : (a) Let us take for instance the convention that the Ministers are responsible to the Commons and if out-voted by the House, they are bound to resign. These Ministers are not appointed by Parliament but by the King in virtue of his prerogative. Theoretically, they hold office during his pleasure, but practically, so long as they command confidence in the House. As soon as they lose that confidence two courses are open to the King. If he thinks that the House represents truly the will of the nation he may demand resignation from the Cabinet. If he has any reasonable doubt about it he dissolves the Parliament and appeals to the nation. The wishes of the ultimate political sovereign are thus given effect to either directly or indirectly. The convention gives ultimate control of the executive to the nation. (b) Again, the Crown can legally dissolve Parliament even if the Ministry is supported by a majority in the House of Commons. He can also dismiss the Ministry that is so supported by the House. The Crown has got these powers in law by virtue of the prerogative. How are these powers exercised so as to give effect ultimately to the will of the nation? At first sight, the exercise of these powers appears to be incompatible with the will of the electorate, inasmuch as the representatives of the nation are dismissed and their will over-ridden by the Crown. However, it may sometimes happen that the representatives of the nation in the House of Commons do not reflect truly the will of that ultimate sovereign. If the Crown reasonably believes this state of things to exist, the exercise of the prerogative will mean an appeal from the legal to the political sovereign. Even if the Crown is wrong in its belief the country does not suffer by the exercise of its powers. The dissolution of Parliament gives the electorate an opportunity to give its verdict. History affords two notable instances of the exercise of this power. (i) In 1784, the King dismissed a Ministry supported by a majority in the Commons and dissolved the House. At the general election, the electorate gave verdict in favour of the

Ministry and proved the Crown to be in the wrong, The same party was returned in majority and the same Ministry had to be reinstated in office. (ii) In 1834, the result of the dissolution, and consequent general election was against the Ministry. These instances prove beyond doubt that the ultimate aim of the exercise of the prerogative, as regulated by the conventions, is to give effect to the will of the nation. It is the political sovereign which ultimately determines the right or power of the Ministers to retain office.

284. (2) Exercise of the Privileges: Take for instance the understanding that in case of difference between two Houses, the House of Lords must give way at a certain point. It is evident that the Commons represent the nation's will and the Lords must not be allowed to over-ride the wishes of the political sovereign. What then if the Lords do not give way? Under such circumstances the Crown is expected to nullify their resistance by creating new peers, by the exercise of his prerogative, if he thinks that the Commons represent on the matter in dispute the deliberate decision of the nation. This is the only convention concerning the privileges of Parliament and that too requires the exercise of the prerogative. Consequently, we can safely assert that *all conventions are rules of morality determining the mode of exercising the prerogative of the Crown so as to coincide it with the will of the ultimate political sovereign, the Nation.* Their aim is to secure ultimate supremacy of the electorate, as the true political sovereign of the State.

285. Relation to Sovereignty of Parliament: The Crown's right of dissolution existed, as we have seen, for the purpose of ascertaining the ultimate will of the political sovereign. There has been a good deal of controversy over the two historical instances of dissolution just referred to above. In 1784, George III dissolved the House although the Ministry commanded the confidence of the House. In 1834, William IV. dissolved the House because it did not support the Ministry appointed by him. Although the circumstances of the two cases differ widely, the King in question acted constitutionally. The desire was to appeal to the nation and to ascertain whether the will of the political sovereign coincides with that of its representatives in Parliament, the legal sovereign of the country. These rules as to dissolution like other conventions of the constitution aim at securing the ultimate supremacy of the political sovereign, and stand in close relation to the sovereignty of Parliament. The rules of this sort are not necessary under a constitution like that of the United States and the right of dissolution may be dispensed with there. The constitution provides that no change of vital importance can take place without referring the same to the people, and the reelection of the two legislatures at stated intervals keeps up, in the long run, harmony between the sentiments of the nation and those of its representatives. On the other hand, in a sovereign and constituent Parliament some further security for maintaining such harmony is required and the same is provided in the United Kingdom by the right of

issolution. It enables the Ministry or the Crown to appeal from the legislature to the nation.

286. Recent Changes : There have been some notable changes in the conventions of the constitution during the last two or three decades. (a) Some new conventions have arisen, *without any change in law*, to meet the wants of a new time. In this category may be placed the convention that the electorate decides at the general election that a particular party shall come in power or even that a particular person shall be the Prime-Minister. Another convention that has gradually grown is that the reigning monarch shares and gives expression to the moral feelings of the British Nation. Rules of procedure have also changed and the various devices like closure or guillotine have helped the executive, when supported by a disciplined majority, to carry through legislation which would otherwise be impossible. (b) Some of the old conventions have been *converted into law* by a statute, e.g., the convention that the House of Lords cannot originate a Money Bill, by the Parliament Act of 1911. This Act also restrains the convention concerning the creation of peers. Another result of the Act is that each Parliament shall endure for its full legal term *i. e.*, five years. This security of tenure has enabled the majority of the Commons to overrule the will of electors on more than one occasion, e. g., in the matter of passing the Home Rule Act for Ireland. Thus it has now become possible to make fundamental changes in the constitution even against the will of the political sovereign.

287. General Tendency : The general tendency of these new conventions is to increase the power of the party, who for the time being commands a majority in the House of Commons, and to place the control of legislation and government entirely in the hands of the Cabinet. Owing to these circumstances, legislation has now become the exclusive business of the Cabinet and it very rarely occurs that a private member can carry a Bill through Parliament if the same is not supported by the Ministry. This body, the Cabinet, is as a general rule the representative of a party, not of the whole nation. The electors now remain only nominally supreme but they can make their sovereign power felt at the time of general elections, when they can transfer the government of the country from one party to another.

2. How are they enforced?

288. Sanction behind Conventions : We have seen already that the conventions of the constitution are merely rules of political morality. They are not laws, *i. e.*, rules which will be enforced by the Courts. The question, therefore, naturally arises, what is the sanction by which these rules are enforced in the practice? Although they are not laws, they are considered to be as binding as the laws. What is the force which compels obedience to them? Suppose a Prime-Minister is outvoted in the Commons on an important ques-

tion. He exercises his right to advise the Crown to dissolve Parliament. As a result of the general election, the majority is returned to this House; which again defeats him. If he continues in office after the second censure, we will say that he has acted unconstitutionally. But we cannot say that his continuance in office is illegal and no action can be taken against him in a Court of Law for breach of the convention. How then can he be compelled by Parliament to leave his office? Let us search for an answer to this query.

289. Not invariably obeyed: In our search for a satisfactory answer to the query, we are confronted, in the first place, by the fact that it is not all the conventions which are always and invariably obeyed in practice. There are many constitutional maxims or understandings which are in fact often disobeyed. This fact is viewed by some writers as showing that convention have really no sanction behind them. They are merely rules of constitutional morality and may or may not be obeyed. Satisfied with this explanation, they do not proceed further in their search for an answer to the query noted above. There are others who, however, take an entirely different view. They assert that no true constitutional rule is ever disobeyed, and that those maxims which are disobeyed do not in reality form part of the constitution. That is not so. Although obedience rendered to different conventions is of a variable nature and in some cases even fictitious to a certain extent, the assertion is quite true that all conventions have nearly the force of law. Again, we must bear in mind one thing and it is this. All those conventions, the aim of which is that government must be carried on in accordance with the will of the House of Commons, and ultimately with the will of the nation as expressed through the representatives of the nation in that House, are always obeyed in the long run. Although they are not laws such conventions are as good as laws, not in the sense that they will be enforced by the Courts, but in the sense that they will be invariably obeyed in practice.

290. Unsatisfactory Answers: Some writers content themselves by finding one or two insufficient answers to the query in question. (1) *Public opinion:* The most popular answer is that it is the force of public opinion and the dread of popular censure that secure obedience to the conventions of the constitution. In a sense this is true but only to a particular extent. Of course, the nation expects that the Cabinet will resign office on being outvoted by its representatives and no public man will probably dare to go against that expectation. But instances have happened when Ministers¹ have not resigned even though they were defeated a second time, after an appeal to the Country. The dread of public opinion did not deter them from continuing in office. The moral force of public opinion is not therefore sufficient to enforce obedience to conventional precepts. (2) *Fear of Impeachment:*

1. Lord Palmerston did not resign although he was censured a second time by the newly elected House of Commons.

Some writers think that the conventions are ultimately enforced by the fear of impeachment. As we have seen, impeachment is a sort of legal proceedings wherein the House of Commons is the complainant and the House of Lords acts as the Court. If this answer were true or sufficient, the conventions would be rules of law and not mere maxims of constitutional morality. The procedure of impeachment is a legal procedure though not before an ordinary Court, but before an extraordinary tribunal. It is doubtful whether breaches of conventions can be made subject of such proceedings. Again, the weapon of impeachment has gone out of use and become obsolete. The answer appears to be insufficient from another viewpoint also. It is one of the conventions that Parliament should meet once at least in each year. Suppose a Minister breaks this convention by advising the Crown not to summon Parliament. There cannot be any impeachment proceedings unless the Parliament is sitting. The Minister may thus avoid impeachment proceedings against himself by continuing to break the convention year after year and make it impossible for Parliament to enforce the remedy. /

291. The true Answer : Force of Law : It is therefore, neither the dread of public opinion, nor the fear of impeachment which enforces obedience to conventions. No doubt, public opinion does exercise some moral influence and the fear of impeachment at one time also kept the unscrupulous statesmen in check to a certain extent, but the conventions are enforced in practice by something else. The true answer to the query is that it is *ultimately* the force of law which enforces obedience to these conventions. The fact is that the breach of conventions brings the offender ultimately into conflict with the ordinary law of the land and the Courts of Law and that is why they are observed as strictly as any of the laws.

292. How it works : (1) Responsibility of Ministers : Let us test the truth of this explanation. Take for instance the convention, that the Ministers are responsible to the Commons and ought to resign as soon as they lose confidence of the House. Supposing, the House of Commons passes a vote of censure on the present Ministry and shows beyond doubt that they have lost their confidence. Constitutionally, there will be two courses open to the Ministry. They may either resign their office at once or advise the King to dissolve Parliament and thereby appeal to the electorate. Now suppose, the electorate returns a majority against the Ministry and thereby approves of the action of the Commons. Constitutionally under such circumstances, the duty of the Ministry will be to resign their office, if they wanted to observe the conventions. They do not wish to do anything of the sort and continue in office in defiance of the majority in the House. What will be the consequences? If the Parliament is sitting, they can force the hands of the Ministry by refusing to pass the annual Acts, e. g., the Army Act or the Appropriation Act. The consequences will be that all persons acting under the authority of the said Acts

will be liable either to proceedings or prosecutions in the Courts of law for their actions, which will then be unlawful. Take for instance the Army Act. The discipline of the Army depends upon the passing of this Act. If it is not passed all means of controlling the army without a breach of law would disappear and the officers as well as soldiers would be exposed to the danger of criminal proceedings for their acts. Take again the case of the Appropriation Act. If that Act is not passed it will be illegal for the Ministers to handle the revenue and if they did so, they will be liable in a Court of law for their illegal acts. In this case, again, they shall have to deal with officials, like the Comptroller-General and the Governors of the Bank, who have no connection with the Administration. It will be evident from this how the force of law ultimately, enforces observance of the conventions. The consequences will be the same even if the Ministry do not dissolve the Parliament and appeal to the electorate.

293. (2) Annual Meeting of Parliament: It may be suggested that they will not convene the Parliament. In doing so, they will violate the convention that Parliament must meet every year. And, if it does not meet, the Annual Acts will expire *ipso facto*; and there being no Parliament to renew them, the acts of the Ministry would necessarily be illegal. Thus, in any case, they shall have to observe the conventions and will be compelled to resign their office. The very fact that Parliament possesses this power to compel the executive to act in accordance with its wishes has proved sufficient in England to enforce obedience to the conventions of the constitution. The mere existence of this power makes its use unnecessary.

294. Law and the use of Force: It may be suggested that even law may be over-ridden by the use of force. What then about the conventions? Of course, nobody asserts that the conventions have more force than the law itself. Our effort is only to show that no authority can violate the conventions without ultimately breaking the law. If the law can be defied, the conventions can also be defied. But the characteristic feature of the English constitution, the sovereignty of Parliament is a sufficient safe guard against violent attacks on the constitution. What can be achieved by a revolution, can more easily be achieved by a Parliamentary majority. The flexibility of the constitution is a sure safeguard against revolutionary attacks.

295. Why old methods are obsolete: Such is, in fact, the relation between the law of the land and the conventions of the constitution. The old methods, like impeachment of compelling obedience to the will of the nation as expressed through Parliament have fallen into disuse because they have become unnecessary. These conventions are variable by their very nature because the will of the nation, which they are supposed to enforce, is variable. No one can say definitely to what extent the will of the nation requires rigid observance, at a given moment; and that is the reason why these conventions obtain a varying amount of obedience. This indefiniteness often justifies the action of

the executive of disobeying the will of the House of Commons. The essential thing is they have to obey the House as representing the nation and if they have reason to think the House does not correctly represent the will of the nation, they can defy the House for the time being. The same is the case with the convention that the House of Lords must give way at some point. That point is not definitely fixed. A Ministry may exist without the confidence of the Lords and may follow the policy or carry out legislation of which the latter do not approve. At bottom this is due to the fact that the nation has power to compel their obedience. But that power (of creating new peers) is vague and therefore the degree of obedience it commands from the House is indefinite.

296. Crown's Prerogative: Even the exercise of the Crown's prerogative, which these conventions regulate, is vague and uncertain. In fact, though every act of state is done in the name of the King, the real executive power is in the hands of the Cabinet. And, this is also equally true, that although the King has no direct concern with the act done in his name, he can exercise his personal influence in the matter. The conventions which regulate and control the exercise of this influence are vague because no hard and fast rules can be prescribed for the same in view of the fact that the King's action is to coincide with the will of the nation and no body knows what is the amount of interference desired by the nation at a particular moment.

297. Crown's personal Influence: This much is certain, however, that the existence of the prerogative gives the King many chances to exercise his legitimate influence as a constitutional ruler, since he is to be consulted and informed about the important acts of state done in his name. Again, the exercise of the prerogative tends to increase the authority of the House of Commons and ultimately of the electorate which that House represents. This may appear to be a paradox, at first sight, because the exercise of the prerogative invests the Cabinet with discretionary and arbitrary power, which are constantly exercised free from Parliamentary control. But on detailed examination, it appears to be a simple truth. If the Cabinet can act only in accordance with the Acts of Parliament the influence of the House of Lords comes into play. An Act is passed generally not according to the wishes of the Commons, *i. e.*, the electorate, but according to their wishes as modified by the Lords. Thus the power of the Cabinet which can be exercised only in virtue of a statute are to a certain extent controlled by the Upper House. The powers derived from the prerogative, on the other hand, can be exercised by the Cabinet, to give effect to the wishes of the nation, even if those wishes are opposed by the Lords. Even if the Lords, hamper a particular piece of legislation, the effect of their obstruction can be nullified by the exercise of the prerogative. The prerogatives of the Crown have in fact become privileges of the nation. They can now be exercised by the Cabinet who are in reality the servants of the electorate.

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